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THE

SCOTTISH LAW REVIEW

AND

SHERIFF COURT REPORTS.

THE

SCOTTISH LAW REVIEW

AND

SHERIFF COURT REPORTS.

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SCOTTISH LAW REVIEW.

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THE PROFESSION OF THE LAW.*

THERE is a function, reflected in the style and title of this Society, which every human community craves, without which no human community can hold together, and on the well or ill performance of which the well-being of every human community depends—the function to which Sir Thomas Craig, of Riccarton, devotes the first chapter of a book which everybody quotes and nobody reads. He describes it as the function *de offensione aut injuria cognoscere quodque aequum sit inter vicinos decernere*, and epitomises it in two Latin words which give this Society its name—*jus dicere*. There is a crispness about this epitome of which our own Saxon tongue is incapable; how incapable can be measured by thoughtfully comparing these two short but comprehensive and satisfactory words with the vague expression which most closely corresponds to them in our own language—the administration of justice. The name of the Juridical stamps it as being connected in spirit and object with this permanent and beneficent social function. If the longevity of the oak holds any guarantee for the security of the ivy which clings to it, the deep roots of the profession of the law in Scottish soil afford no small promise of stability and endurance for a Society which finds the reason of its being in the spirit of that profession and its object in ministering to that profession's service. It may be left to the philologists to explain the perversity of linguistic invention which evolved such a low-bred looking adjective as *juridicus* out of the pure matrix of the simple but pregnant phrase *jus dicere* or the corresponding substantive *juris dictio*. These are curious and alluring by-paths; but they lead into regions foreign to the present purpose. The point is that the whole volume of the labours of the legal profession is summed up in the Society's name. For the beginning and the end

* Inaugural Address to the Edinburgh Juridical Society by the Rt. Hon. Lord Clyde, Lord Justice-General, on 28th October, 1921.

of that profession's work is *jus dicere*. It is not the judge only, before whom a wrong-doer is brought or to whom a dispute is submitted, *qui jus dicit* in his judgment, though his position gives his dictum authority. When a legal adviser is asked to enlighten a client anxious to know the right of a matter, and tells him the right of it—he too *jus dicit* in his opinion. And the law agent who puts his employer in the way of giving legal form and effect to his business or personal transactions *jus dicit* also. To enforce the law of the land, to explain it, to apply it—these are of course the high and responsible duties of the profession of the law; and in the performance of them, the Courts, and the two branches into which the profession is divided, act in the closest inter-dependence. The Juridical Society unites the bench, the bar, and the desk in its membership; and it may be thought not out of place to offer a few reflections, however desultory and incomplete, upon the duties of those whose business it is *jus dicere*.

We spend our lives in trying to learn this *jus*, which it is our business to declare to others, and of whose mysteries we are the prophets. In the batch of wools that go to make the yarn of professional character there is a strain of the scholar—the scholar of whom Chaucer made a thumb-nail sketch in the line "Gladly would he learn and gladly teach"; and this affinity with the scholarly frame of mind is one of the spiritual factors in professional life which help to redeem it from commercialism, its worst and most besetting temptation. At least so it seems to me. But what in its essence is this *jus* we learn that we may teach, this "justice" we help each other to administer, this "law" which is the working material of our contentious days and laborious nights? We recognise it under many names, and we realise its existence behind many forms, some the very reverse of prepossessing. But we are like the woodman bent at his task; the trees stand densely around, and the thickness of the undergrowth—to say nothing of the cruel multiplicity of its thorns—claims unremitting attention. There are but rare moments when our minds are sufficiently at leisure with themselves to take in the mighty presence of the woods in which our working life is cast. Indeed the essence I am in search of is not to be found in the institutional page, though it sparkles between the printed lines; nor in the laboured arguments of judicial decision, although it glimmers through the tangle of fact and circumstance with which they contend; nor in the dreary and ever extending desert of statute law, though even there the sands are touched with its reflected light. The essence of the law we serve and of which we are the professed ministers comes

from sources more august and more enduring than any of these. "I may be asked," says Sir Thomas Craig, "how it was possible for "justice to be administered in the days before laws were made or "principles of equity formulated, and when there were no standard "weights to which the scales of justice could be made to conform. "I answer," says he, in the eloquent diction of his time, "that justice "followed those counsels of natural equity which are part of the "birthright of man, those original instincts of Right which are in-"born in his character and which spring, undefiled and unchange-"able, from the ever-enduring authority of the conscience of man-"kind." Like every other department of life to which intellect applies itself, the body of the law discloses to the enquirer a frame of principles rationally designed and held in logical equilibrium. But the body which this frame supports is a living body and breathes the spirit of Right. Its life is one with the lives of those out of whose myriad relationships—past and present—it has evolved itself. As every lawyer knows, the real law of Scotland is the custom of Scotland—that precipitate, that generalisation, which gathers and forms from the practice of succeeding generations of men in conducting those relationships; for, in conducting them, men are at once actuated and restrained by the universal and compelling necessity of reconciling them with right conduct and fair dealing. What we know as legal relations had neither respect accorded them, nor permanence nor security attached to them, else. The essence in short of this *jus* is that it is the fruit of the constant striving of the human spirit after the Right. We are all conscious of a certain affectionate pride in our profession cherished in some corner or other of our hard hearts. It seems to me that this reveals the true if often unconscious inspiration of it. And if that be so, then it is a wholesome thing in a moment of reflective candour to look beyond the engrossing appearances of materiality, and bring ourselves face to face with it. It supplies another strain in the batch of wools that go to make the yarn I have already spoken of—an unconscious influence whereby the practical outlook of the professional mind is tempered with a share of the detached austerity which belongs in fuller measure to the student, the philosopher, or the priest. Enough on this topic—one on which it would be easy to enlarge. But the profession of the law would cease to be what it has hitherto been, if it never brought it to mind.

These reflections point to one of the most interesting peculiarities of that profession. The employment of any sort of service usually results in making the servant's duty wholly to his employer. But it is a paradox in the employment of legal

service that the paramount allegiance of the lawyer is due not to his client but to the law. In other words, his true duty to his client is in perfect loyalty to the law. He is employed, no doubt, to promote his client's interests, but the means by which he is permitted to do so are limited to the ascertainment and vindication of those rights which the law accords to the client; and he is unfaithful to his professional duty if he knowingly promotes his client's interests beyond the point of legal right, or by means of transgression, or even avoidance, of the law. It is indeed obvious that the profession exists to help people in securing their legal rights, not to aid them in contriving ways of committing legal wrongs: and it may appear at first sight as if this super-eminent obligation of the lawyer to be loyal to the law before his client was of like quality with the iron necessity which binds an engineer to respect the laws of gravitation in whatever attempt he makes to serve the purposes of his employer. But there is nothing comparable between the one and the other. The laws which control the design of the engineer are those of nature—immutable, and universally sanctioned by physical penalties as certain as they are severe; while those of which the lawyer is the minister are man-made, bring punishment for the most part only when discovery of transgression occurs, and are but imperfect interpretations of those governing but protean notions of Right which defy formulation by their very supremacy and comprehensiveness. Note how widely the gulf between the professionalism of the law and commercialism opens. The function *jus dicere*, in short, is one which belongs to confidential—not to hireling—relations: and so long as the profession remains worthy of its high calling there will always be something in the attitude of those who approach it for help and guidance, quaintly reminiscent of the deferential relation of the *cliens* to the *patronus*—although, by the by, just what that relation was when these terms were used in Roman days nobody seems to know. We are brought to a standpoint from which the significance of the rules of professional remuneration is seen to stand out clearly—rules which forbid payment to counsel of anything but an honorary reward and deny him the right to enforce even that, and which submit the solicitor's account to the most artificial regulation. I believe the quaint attachment which adorns the back of the advocate's gown is a picturesque reminder of this singularity of the profession. He carries the figurative remnant of a mediæval purse on his back, not to show contempt for the pickpocket, but as a symbolic assurance that the rule of his order forbids that the single-minded performance of professional duty should be distracted by

anxieties as to the inadequacy or the excess of the reward which the client is able—or is pleased—to put into it. If I may follow one of the great men of the profession* in adapting the language of Sydney Smith, I may express the rule thus—"There is only "one rule of professional conduct: do what you think right, and "take position and emoluments as an accident; all else is labour "and sorrow." The fundamental ratio, however, of this distinctive feature of the profession is to be found not so much in the intimate character of its relations with its clients as in wider considerations of public policy. Entrance to the profession is jealously guarded because those who are admitted to it are privileged. The function *jus dicere* becomes their monopoly. They acquire a certain *status*: and both the *status* and the accompanying privileges are the gift of the community which creates or sanctions them in its own interests and for its own ends. *Status* always carries with it obligations corresponding to its privileges, and the creditor in these obligations is the community which has created or sanctioned the privileges. If the client appears to be the creditor, it is only because he is a member of the community which is the real creditor. In short, professional privileges are held in public trust. Only in outward seeming does the judge appear to hold a *status* of obligation—to discharge the *munus* of a public *officium*—in a sense different from that in which counsel or solicitor hold their respective qualifications and perform their respective duties. Judge, counsel, and writer, are all three equally members of the College of Justice, and the two latter perform an *officium* for the clients they serve, equally with the judge, and are just as responsible to the public at large in the performance of it as the judge is. There is a topic I have heard ardently debated at the fireplace which may be used to illustrate this. A pleader knows or believes that his client's case is put out of Court by an authority of which he perceives that his opponent and the bench are alike blissfully forgetful—ought he to keep his thumb on it and win, or disclose it and take his chance? Of course, there are not many cases which raise this predicament purely. But there are a good many in which it pinches more or less. My answer to the question is that the pleader betrays his profession if he opens the case without disclosing the authority. To begin with, it seems as clear as can be that the pleader's duty to his client was to tell him he had no case before he came into Court at all: his obligation *ius dicere* surely required as much as that. If, notwithstanding, the client chose to take a sporting chance the

* James Roberton, LL.D., in his address to the Glasgow Legal and Speculative Society on the proposed abolition of the Feudal System, 1870.

pleader's duty is to do his utmost to induce the Court to aid him in removing or circumventing the obstacle which the course of prior decision has thrown across the path—either by overruling or distinguishing it—but never to conceal it, or to represent to the tribunal whose assistance in vindicating the Right is invoked that something or other is the law which the pleader knows is not. I remember it used to be argued in extenuation that it is the business of the Court to know the authorities. One fallacy in this contention seems to be that, if it was sound, it would make the citation of any authority an impertinence. Besides, I suspect that, if the hypothesis on which it rests were well founded, there would be very few of us fit to hold the King's Commission. Strangely enough, where matters of fact are concerned, the right and the wrong of this problem in professional morals are never in doubt in any one's mind. If a fact vitally relevant to the obtaining of the legal remedy sought is knowingly withheld, the misdemeanour is called by its proper name—a fraud on the Court, and discipline follows discovery. Yet the only substantial difference between smart practice in fact and smart practice in law is that the client is a participant in the first, while the latter is the work of his advisers alone—a difference which if it counts for anything does not tell in favour of the latter.

I have already referred to the close inter-dependence which exists between the two branches of the profession, and between both of them and the bench. It is a feature of our professional relations happily recognised in the good feeling which pervades them. But too much cannot be said or thought of its importance —especially by beginners—in relation to the problem of efficiency in the discharge of our common obligations to the public. The matter is most easily illustrated by reference to the conduct of judicial business. If the judicial machine is to produce the best results, there are two conditions which must be complied with *in limine,* two conditions which constitute, so to speak, fundamental rules of the game. The first is that when a case comes on for debate, the Court is not to have given whatever merits the pleadings may disclose any prior consideration. The second is that by the time the case has reached that stage, counsel and agents shall have given it every consideration which fidelity, industry, and learning make possible. An illustration of the first of these rules is provided by the practice of counsel in opening a reclaiming note or an appeal: the nature of the dispute which has arisen between the parties, and its relation to the remedy sought, are first expounded—the judgment reclaimed against or appealed from is read last. The reason of the practice is that the

judges of appeal ought to approach the case in the first instance without knowledge of the particular conception of the dispute and its merits which has been formed by the judge of first instance. This condition of open-mindedness on the part of the appeal judges might be imperilled if they have already read the judgment reclaimed or appealed against for themselves. There are partial exceptions to the rule forbidding the judge to apply his mind to the merits before hearing counsel, and for that purpose to probe into the papers before the case is called for hearing. Obvious instances are presented by Full Court Cases and House of Lords Appeals with written cases attached to them, also by adjusted Special Cases; and the ever varying circumstances of judicial procedure may create other, if less obvious, exceptions. But in general, counsel and agents rely, and are entitled to rely, on the mind of the Court being not only open, but virgin, so far as the merits of the particular case is concerned when it is first opened for discussion. To the second rule, which applies to counsel and agents, there are no exceptions whatever, not even partial ones. The Court in turn relies, and is entitled to rely, on the completeness and efficiency with which the professional work of investigation, deliberation, and presentation is performed for the case. What are called first impressions have enormous power in directing the subsequent course of thought in all minds, including some trained professional ones; and according to the designed structure of the judicial machine these initial impulses should be the effect, not of private excursions into the papers by the judge, but of open forensic strategy directed by counsel with knowledge of the whole field of dispute. So much depends in these matters on getting the true perspective of a case, and nothing so easily distorts it as a fallacious first impression. The pleaders have both a right and a duty in this matter. It is the right of the pleaders on both sides to be the first to present their cases in perspective: and a true conception of the reality is more likely to be made by the judge if he defers any attempt to construct any perspective of his own until he has seen and compared theirs. But it is the duty of the pleaders to see to it that their perspectives are complete; for nothing is more fatal to their effect than the omission of some feature from the picture which the judge is left to discover for himself. The natural tendency is to make too much of the discovery, and the judge may find himself betrayed into giving it an exaggerated importance in the scheme of perspective he finally adopts. It is, of course, an ill wind that blows nobody good; and while I was at the bar I have known a thoroughly bad and inefficient opening result in a Lord Ordinary making for himself

out of weariness and impatience, a case for the opener—which case, being his own child, he refused to allow the opposing counsel to slay. I must admit, however, that it was strangled incontinently in the Division. What I want to stress is the weight of the responsibility which rests on the professional shoulders of counsel and agent. At the same time I must not be suspected of any desire to attenuate the share of responsibility which is borne by the judge at the hearing of a case. I entertain no partiality for a judicial pose of non-intervention in debate, and I have no patience with what may be called the *dum defluat amnis* attitude. On the contrary, I think the judge's duty is to contribute of his best to the process of elucidating and examining the crucial issue. According to my own experience, the silent gloom of mere judicial receptivity is far more paralysing in its effects upon the pleader than the frequent but responsive interruptions which issue from an active mind. Of course, there is moderation—that counsel of perfection—in all things: and there is a well-known distinction between the expedient uses of a pepper-box and the useless interferences of a chatterbox. But if the pepper-box is handled in good temper, and with the genuine intention to bring out the true flavour of the dish, I am certain that the application of something more than just enough of its contents is less detrimental than abstention from its use. One other point in this connection—it must not be supposed that the decision of a case is in general made any easier by the circumstance that it has been well argued. It is true that much of the anxiety and uncertainty which always attends the formation of a judgment upon a case that has been imperfectly presented is removed when its *penetralia* have been thoughtfully explored in debate. But the keener the pleader's work, the more delicate in general becomes the balance between those ultimate considerations upon which the crisis of a sound opinion turns. The fact remains that, if the best is to be got out of the machine, all its parts must work together in the spirit of that mutual interdependence of which I speak. Whatever we do, we shall of course make our mistakes in plenty, fall into the abounding traps of misconception, and be guilty of errors of judgment. But there is one mistake, one source of failure, we can all avoid, which is to do anything less than our very best. Every point missed in a pleading, every slovenliness in procedure, every fact omitted from a proof, every authority neglected in an argument is an unnecessary addition to the risks of miscarriage—a breach of the trust which is rightly placed in the efficiency of the profession; and the sufferer is the public whom we serve, and

upon whom, incidentally, we depend. I know it is a familiar reflection in the mind of counsel that the value of his opinion to the client who pays for it depends quite as much on the completeness and balance of the draftsmanship of the memorial in which the solicitor purveys to him the raw material as on the fullest measure of experienced sagacity and sound learning counsel can bring to bear upon it. In the same way the value which the country gets out of its costly judicial machinery for the administration of justice depends just as vitally on the degree of efficiency with which the profession in both its branches renders its services in the Courts as on the powers however brilliant, the breadth however sane and equitable, the accomplishments and pains however lavishly and loyally bestowed, of its judicial minds. There was a case in the House of Lords* not long ago about the competency of letting for hire part of a public harbour which illustrates my point.

(*To be concluded.*)

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* *Greenock Harbour Trustees* v. *Glebe Sugar Co.*, 1921, A.C. 66.

VALUATION OF IMPROVEMENTS UNDER THE AGRICULTURAL HOLDINGS AND SMALL LANDHOLDERS ACT.*

The rule under which landholders' improvements are to be valued by the Land Court in Scotland is laid down in sec. 10 of the Crofters Act of 1886, which is incorporated by reference into the Small Landholders Act of 1911. It enacts that "improvements shall be valued under this Act at such sum as "fairly represents the value of the improvements to an incoming "tenant." It has to be noted that, in describing the principle of valuation, the Act uses the words "an incoming tenant," and not "the incoming tenant," and the words used are exactly similar to those in the Agricultural Holdings Acts for both Scotland and England.

In the recent case of *MacMaster* v. *Esson*, 1921, 9 S.L.C.R. 18, the provision referred to was the subject of some observations of general interest. The case arose out of the following facts. A tenant having renounced his holding and applied to have compensation assessed in respect of permanent improvements, the landlord averred that the holding as a separate holding had proved unlettable, and that he consequently had let it to a neighbouring farmer, who had no use for the buildings on the holding, and he argued that the type of incoming

* We propose this year to give occasional reviews of leading cases in Agricultural Law, which may be of practical service to country practitioners more particularly.

tenant which he had been able to secure for the holding was a relevant consideration in assessing the amount of compensation to the outgoing tenant. The Court held that the particular type of incoming tenant had nothing to do with the matter of assessment of compensation to the outgoing tenant, for the principle of valuation applicable was that the improvements should be valued as being appropriate to a holding, and that the incoming tenant, whether actual or hypothetical, is assumed to be entering upon the holding as such.

Had the definite instead of the indefinite article been used, there would not have been much difficulty in deciding the point raised by the landlord. As regards the construction of the words in question, the landlord's agent at the hearing maintained that the Court were not entitled to value the buildings as for a hypothetical incoming tenant, but must look to the circumstances which have actually arisen, and value the buildings accordingly.

There does not appear to have hitherto been any authoritative decision on the point by the Scottish Courts, but in commenting on the use of the words in question in the Agricultural Holdings Act for Scotland, Sir Isaac Connell, in his commentaries on that Act (2nd edition, p. 81), states—"It is important to note that the indefinite and not "the definite article is used. It is not what is the value to the "actual incoming tenant. There might be no incoming tenant, "or the incoming tenant might be going to use the farm in such "a way that the improvements would be of very little, if any, "value to him. Arbiters must get out of their heads the idea "that the particular incoming tenant and his intentions have "anything to do with the matter. They must consider more "in the abstract what would reasonably be the value to an "incoming tenant who would be likely to enter the subject and "use it agriculturally in the ordinary way, apart from anything "exceptional which may arise under the conditions of the new "tenancy."

Something exceptional did undoubtedly arise in this case under the conditions of the new tenancy. The holding had been let to the neighbouring farmer (who was not a landholder) in enlargement of his farm, and he had stipulated for the removal of the buildings. The holding would therefore cease to be a landholder's holding. Was the applicant, by reason of these circumstances and the fact that the landlords had been unable to let the holding otherwise than in enlargement of the neighbouring farm, to lose his right to compensation for buildings which he had erected for the proper cultivation of the holding?

When closely analysed it would appear that the landlords' contention turned upon the fact that no tenant who would continue the holding as a small farm complete in itself had been obtained, and that the buildings erected upon it for the purposes of its cultivation, and which were suitable to it as a holding were of no value, as buildings, to the actual incoming tenant, who was a neighbouring farmer, and who proposed to use the holding merely as an addition to his cultivated land, he himself being already provided with a fully equipped steading upon his farm. They refused to go so far as to say that there must be a tenant before compensation could be awarded, and their argument ultimately came to this, that the character or class of the incoming tenant and the uses to which the land was to be put were relevant in considering the amount of compensation to be awarded.

The effect of this argument would, in this particular instance, be that improvements should be valued, not as belonging to a properly equipped small holding, but as if the holding had ceased to exist as such and had been merged into the outlying part of a large farm, which was otherwise adequately provided with buildings before this claim emerged. The Court were unable to find warrant in the statute for any such view, and decided that the principle of valuation prescribed must be applied on the supposition that the improvements are to be valued as being appropriate to a holding, and that the incoming tenant, whether actual or hypothetical, is assumed to be entering upon the holding as such. Any other view, it was thought, would be destructive of the right of compensation for improvements on and suitable to the holding, which is conferred on the tenant by sec. 8. It would also make the two sections inconsistent with one another. Sec. 8 enacts that the landholder is entitled to compensation for improvements suitable to the holding, and it is impossible to suppose that the Legislature, having given that right, should at once destroy it by enacting in sec. 10 that the improvements must be suitable, not to the holding, but to the incoming tenant, whatever his requirements or necessities might be.

It is possible, however, to read the two sections together in such a way that they are quite reconcilable. The improvements being suitable for the holding, their value is to be appraised at what an incoming tenant to the holding, as such, would naturally give for them. The introduction of the incoming tenant in sec. 10 is merely for the purpose of furnishing a guide as to how improvements suitable to the holding are to be valued, and not for the purpose of denying or qualifying the outgoing tenant's right to compensation therefor. The two

ideas are complementary or exegetical, and not antagonistic. Having found the improvements suitable to the holding, the valuator has then to consider, in the case of buildings, the materials of which they are constructed, their age and probable life, and their state of repair. These are some of the considerations which determine their value to an incoming tenant, and conceivably that this was the main purpose for which the criterion embodied in sec. 10 was introduced. If the sections are so read, they are consistent, and supply a complete and systematic standard for the determination of such claims which arbiters hitherto have had no difficulty in applying.

The equity of the matter appears to be also strongly in favour of this view, because it seems to be unreasonable that the amount of the tenant's compensation should be dependent upon whether the landlord might or might not have been diligent enough or successful enough to secure another tenant or a tenant of the same class. The outgoing tenant has no control over the landlord's choice of his successor, and it is of no consequence to him whether the landlord is or is not successful in obtaining a tenant, or one who is willing to follow in his footsteps. Further, the scope of such an investigation might be so wide that it would be hopeless for the tenant to undertake a challenge of the landlord's position that such a tenant could not be secured. Complicated inquiries into all kinds of circumstances might be involved, including questions of fraudulent dealings to evade payment of compensation, which would be quite foreign to the subject-matter at issue, which is, after all, merely the principle of valuation. Further, the state of matters at the date of fixing the claim for compensation in the absence of an incoming tenant, might be immediately thereafter entirely altered by the landlord obtaining a suitable let. Lastly, if the landlords' views were adopted, they would tend to discourage tenants from making permanent improvements, if the recovery of their value depended upon contingencies which it would be impossible to anticipate at the date when the improvements were executed.

THE PLEADER.

We discussed the case of *Taylor* v. *The Corporation of Glasgow* —the poisonous berries case—when it was decided by Lord Hunter (1920, 2 S.L.T. 254), who dismissed the claim as irrelevant, and when the Second Division reversed that judgment (1921, 1 S.L.T. 134). We have now before us the opinions of the House of Lords judges adhering to the decision

of the Second Division. It is unnecessary to go further into the case, as it is now so widely known, but we may remark that it extends the principle of "allurement" to which the decisions of *Cooke* v. *Midland Great Western Railway Company of Ireland*, 1909, A.C. 229, and *Latham* v. *Johnson & Nephew, Limited*, 1913, 1 K.B. 416, gave encouragement. Lord Sumner's statement of the law in the latter case was expressly approved by several of the House of Lords judges in *Taylor's* case. It is this—"The presence in a frequented "place of some object of attraction tempting a child to meddle "where he ought to abstain may well constitute a trap, and "in the case of a child too young to be capable of contributory "negligence, it may impose full liability on the owner or "occupier if he ought as a reasonable man to have antici- "pated the presence of the child and the attractiveness and "peril of the object."

In the action *Lord Advocate* v. *Davidson's Factor*, 1921, 2 S.L.T. 267, for reduction of a will, we notice the following in Lord Ashmore's opinion:—"Having regard to the *prima* "*facie* impression which I formed with reference to the pur- "suer's averments, I thought it prudent to allow the pursuer "an opportunity of considering as to amending his averments." Counsel for the pursuer, however, did not think amendment necessary. The averments were found irrelevant. The remarks quoted suggest to us a useful innovation in procedure. Why should not every judge of first instance adopt the line taken by Lord Ashmore in the case referred to? At present the record is closed and judgment given, and if the averments of either party are found irrelevant and amendment is desired, the case has to be appealed, the record opened up in the Appeal Court, a minute of amendment lodged there, and then the relevancy again debated. Opportunity of amendment before the Lord Ordinary or the Sheriff-Substitute is a point of practice worthy of attention.

Barty v. *Harper & Sons*, 1921, 2 S.L.T. 276, was a very strong case for a finding of contributory negligence against the pursuer, and it seems to us the decision goes further in excusing a pursuer's initial fault than any in our law. It was a driving accident claim. The pursuer was on the wrong side of the road; on a narrow road; at a blind turn on the road; and going downhill. The defender, meeting him on his proper side, drew further to his own side, and drove along partly on the roadway and partly on the bank, with the object of passing the pursuer's vehicle. A telephone pole, the presence of which he had not anticipated, made it necessary for him to

bring his car back on to the roadway, and so he came into collision with the dogcart which the pursuer was driving. The defender was held liable, on the ground that he might, by the exercise of reasonable care, have avoided the collision. What should he have done? When he saw pursuer on the wrong side in so narrow a roadway, he should, the Court thought, have drawn as far to his own side as possible, and stopped there till the pursuer got safely past. The decision almost amounts to laying down a new principle in driving—that the person on the right side is to take care to keep both himself and the person on the wrong side clear of the possible consequences of the latter's fault.

It is interesting to note that both the Sheriff-Substitute and the Sheriff decided in favour of the pursuer, and, on appeal to the First Division, counsel for the pursuer were not called upon to argue the question of the defender's liability, but were heard on the question of the pursuer's negligence, on which they cited no authorities. The opinions of the First Division judges do not contain a reference to a single precedent.

The law as to mobbing and rioting, both in its criminal and civil aspects, may not seldom be called into use in these times of industrial and political uncertainty. The case of *Sloan and Others* v. *Macmillan*, 1921, 2 S.L.T. 296, contains some useful observations as to what may constitute a mob. In the circumstances of that case it was found that five persons constituted a riotous mob. The novel question of the relation of mobbing to peaceful persuasion under the Trades Disputes Act is also referred to.

Literature.

A DIGEST OF ENGLISH CIVIL LAW. By Edward Jenks, M.A., B.C.L., of the Middle Temple, Principal and Director of Legal Studies of the Law Society (editor); W. M. Geldart, M.A., B.C.L., of Lincoln's Inn, Vinerian Professor of English Law, Oxford; R. W. Lee, M.A., B.C.L., K.C. (Quebec), of Gray's Inn, Professor of Roman Dutch Law, Oxford, Reader in Jurisprudence of the Council of Legal Education; W. S. Holdsworth, D.C.L., K.C., of Lincoln's Inn, All Souls Reader in English Law, Oxford; and J. C. Miles, M.A., B.C.L., of the Inner Temple, Fellow and Tutor of Merton College, Oxford; Barristers-at-Law. London, Butterworth & Co. In two volumes. (70s. net.)

This is a masterly endeavour to exhibit in concise and orderly form the principal rules of English civil law. The volumes now appear as the consolidated and second edition of a work which had been issued in eleven instalments during the

previous sixteen years. The subject-matter is divided into five books, of which the first is general, the second deals with obligation, the third with property, the fourth with family law, and the fifth with succession. The method of treatment is, as the name of the work implies, to state the effect of statutes and decisions in skeleton form. This is done in paragraphs which are numbered consecutively from 1 to 2223. To each paragraph there are footnotes containing reference to the authorities digested there, and, where necessary, setting out briefly the historical explanations. The amount of material compressed into the 1422 pages of the digest may be gathered from the fact that the table of statutes and table of cases prefixed cover respectively 31 and 187 closely printed pages. An extremely good alphabetical index extending to 167 pages is appended. The whole is printed on thin paper, thus combining the maximum of substance with the minimum bulk.

We gather that the digest was compiled for, amongst others, the purpose of furthering the study of comparative jurisprudence. This being so, the scientific arrangement of the work becomes a matter of first importance, and the authors have based it on the plan usually adopted in the European civil codes. On the whole, this is a plan more satisfactory perhaps for a European code than for a digest of English law. The scheme of Book I., which aims at a general description of persons and the modes in which they may act, appears to be somewhat artificial. It deals, for example, at some length not only with the extra-domestic status of persons, but also with "legal acts," such as "declaration of intention," "conditions," and "agency." In this way this book is compounded in part of what belongs to the law of persons and in part of what belongs to the law of obligations.

Again one subject seems to us to have got into the wrong category. The Workmen's Compensation Act, 1906, is treated as a title of a section dealing with "torts in respect of the "person." This treatment of workmen's compensation is the more misleading in that no mention is made at all of the provision of the Act for the case where the injury is caused by the tort of the employer. No doubt the subject has been boiled down to twelve brief paragraphs, but the case of third party torts has been dealt with, and the curious omission to deal with the consequences of the employer's tort confirms the impression that his obligation to pay compensation is regarded as arising from tort.

The difficulty of compressing much matter into little bulk has been admirably handled, and it is very rarely that a statement is compressed out of shape. But in paragraph 4 it is said that a person who has a domicile of choice in a country "retains it until he acquires a domicile elsewhere." It is not until paragraph 11 that the necessary explanation is made that if the *de cujus* abandons this domicile of choice he "re-acquires" his domicile of origin. It is thus lacking in accuracy to say that a domicile of choice is retained *until* a

domicile elsewhere is acquired, *sc.* of choice, but, if not of choice, the acquisition by reverter of a domicile of origin is in any case the consequence and not the cause of the former domicile ceasing to be retained.

The present volumes are well designed to enable English law to acquire among Continental jurists the place in comparative jurisprudence which it deserves both in respect of the wide sphere of its operation and of its indigenous peculiarities as a system unlike any modification of the Roman. Moreover, the valuable index and the copious citation of statutes and cases make the work one which we can recommend to all who have occasion to refer to English law, whether as practitioners or as students.

Lord Fullerton. By Lord Strathclyde. Edinburgh and Glasgow: William Hodge & Co., Ltd. (7s. 6d. net.)

Lord Fullerton was born in 1775, passed advocate 1798, became advocate depute 1806, married 1818, went on the bench 1829, entered the First Division 1839, resigned and died 1853. This memorial and study of his life and work is a book well worth reading, especially, no doubt, by lawyers. In part it has appeared before in the form of articles in this Review, but it gains greatly from unification. With the materials which are available we do not see how it could have been possible to do the work better, and it is a very pleasing fact that it has been possible to dedicate the book to the learned judge's only surviving daughter. Needless to say, the book gains greatly by the accession of personal and family aspects which has been made possible by correspondence and papers placed at the disposal of the noble author, but even without these the volume would be a fitting and an able record and review of the professional qualities and attainments of a great Scottish lawyer. Apart from the main theme there are many very interesting sidelights. We are reminded of the £5 5s. charged for stalls for Jenny Lind's first appearance in Edinburgh in 1844. Lord Fullerton's journal shows that about the same time cultured classes in Scotland called 4.30 "half-"five," and a carriage a "machine." Lately we have had an outcry against judges taking paid (or unpaid) directorships; in the middle of last century they were attacked for accepting references for fees, or fees for references. This adds point to the allusion to a movement at that time for an increase in judicial salaries, which we believe is being revived now in England, and "*tua res agitur paries cum proximus ardet.*" Over against Lord Fullerton, who was an acknowledged master in the law, we are brought up against the erratic Chancellor of whom it was sometimes scurrilously said that he knew none. Fullerton was in London when the country was variously affected by the report of Lord Brougham's death in a carriage accident in the wilds of Westmorland, commonly believed to have been a self-created hoax, but the exponent of rancorous

eloquence lived for another escapade about ten years later, when he conceived the phantasy of his own dual existence as a Briton and Lord Chancellor and as a Frenchman and President of the National Assembly of France on the flight of Louis Philippe.

We close this very inadequate notice of a charming book with a glance at the noble and learned author's somewhat piquant remarks on the "haphazard post-prandial deliverances" of Brougham and his brother law lords, and we think we do not err in inferring that, even as applied to modern instances and reversals, there is an indication that it may be allowable for "a solitary doubt to cross our minds about the infallibility "of the test we apply" when we seek to measure the virtue of Scottish decisions by their fate elsewhere. And as to that Lord Fullerton's adjectives are stronger far than those of his historian, for, writing in 1822, he labels the House of Lords as "tiresome, hot, dusty, dull, damnable," but then he was a Whig. The book gains much by the inclusion of photographs of two portraits and of the bust in Parliament House.

The Hague Rules 1921 Explained. By Sanford D. Cole, Solicitor.

In this booklet Mr. Cole gives a short history of the birth and growth of bills of lading, of the varying rules prevalent in different countries, of the need for international regulation and unification, and of the action taken before and at the Hague Conference by the Maritime Law Committee to frame a code which could be embodied by reference in all bills of lading after 31st January, 1922. The text of the rules is given with an explanatory summary, and some notes on special points. The note on "received for shipment" bills of lading discusses recent conflicting decisions. This book will assist in the conferences now going on in chambers of commerce and shipping and banking circles. Mr. Cole reported the proceedings of the Maritime Law Committee at the Hague for the *Law Times* and the *Shipping Gazette*, and is an expert on the subject.

Obituary.

At Lochgilphead, on 4th December, Mr. Archibald MacEwan, aged eighty-nine years. Mr. MacEwan was joint agent of the Union Bank of Scotland. He held a number of public appointments, being secretary and treasurer of the Argyll District Board of Control, collector of Inland Revenue, and clerk to the Lochgilphead School Management Committee. He was clerk to the Mid-Argyll District Committee, under the County Council, from which position he resigned a few months ago.

At Edinburgh, on 6th December, Mr. David Lumsden, depute procurator-fiscal for the city of Edinburgh. Mr.

Lumsden entered the procurator-fiscal's office in Edinburgh in 1888, and after qualifying as a law agent he became depute to Mr. Somerville in 1893.

At Grantown-on-Spey, on 18th December, Mr. John Grant, after a short illness. At one time Mr. Grant was agent of the Royal Bank of Scotland, from which he retired early last year. He held several positions as clerk and treasurer to a number of public boards, some of which he had recently been giving up owing to failing health.

Notes from Edinburgh.

PARLIAMENT HOUSE, 31*st December*, 1921.

THE end of the first portion of the winter session was marked by symptoms reminiscent of the good old days when the greater part of each Christmas recess would be devoted to the disposal of lengthy calendars of jury trials, for on Friday, the day following on the rising of the Court, there were three trials proceeding, with the attendant animation about the premises due to the trooping in of over one hundred individuals summoned as jurors, and also half that number brought as witnesses, all torn from, or saved from, preparations for Christmas in order to bestow attention on the legal disputes of other people. The resemblance to an old-time initiation of a Christmas recess ended, however, with that first day, for two of the three trials were then disposed of, while the remaining one was finished on the day following. With eleven cases originally set down for the sittings, there had been a promise of quite a good harvest, but through settlements made the total dwindled to the three cases tried, and the recess commenced with an encroachment on it of but one and a half days, except for Lords Cullen and Ormidale, who, with the counsel engaged, opened the Glasgow circuit on Tuesday, 27th, and except also for Lord Sands and those appearing before him at a two-days proof starting on that day. It seems difficult to understand why the season of alleged glad tidings and goodwill towards men should be chosen for the gathering together of judges, juries, counsel, agents, and witnesses for civil and criminal trials, in the course of which glad tidings and goodwill are seldom in evidence, except on occasions when juries are influenced by the season to return surprise verdicts.

The three jury trials resulted in verdicts being given for pursuers in two cases and for the defender in the remaining action. Personal injuries provided the material in all three actions, which were concerned respectively with a motor lorry

and charabanc collision, a ship's hatch accident, and a tramcar mishap. The first, which occupied the Lord President a day and a half, was the most interesting from the legal point of view, for, with two defenders called and each blaming the other for the mishap to the injured pursuers, the possibility of one defender being found liable and the other freed might mean trouble in regard to expenses. There were really three separate actions brought by three young lady students, whose injuries had been received while on a footpath which was invaded by a motor lorry involved in a collision with a charabanc. The jury found the defenders jointly and severally liable to the three pursuers, and assessed damages at the sums of £500, £150, and £25. The award last mentioned will not carry more than half taxed expenses unless the presiding judge certifies that a larger amount should be allowed, in which case two-thirds are chargeable, but as the three pursuers were represented by one set of counsel and agents, it seems likely that the First Division will make some suitable finding as to expenses when applying the verdict later on.

It is gratifying to find that the year now closed has been marked by a substantial decrease in the number of divorce cases disposed of as compared with the year 1920. According to unofficial, but none the less reliable, statistics published by the local press, this past year has seen a diminution of 282, the figures for 1921 being 528, as against 810 for 1920; and, while on the grounds of morality a shrinkage like this is most welcome, the people who are to be congratulated on the reduction are the counsel and agents for the poor, for the greater proportion of consistorial causes are raised by parties on the poors roll. If the agents for the poor in Sheriff Courts are deserving of some remuneration from local or other rates, as indicated by the Procurators of Forfar, who recently approached the Lord Advocate on the subject, the Court of Session practitioners in both branches who represent poor litigants are equally deserving of some financial recognition.

An action which was followed with close interest by Edinburgh people was recently decided by Lord Sands, who, after taking proof, had had it at avizandum for some considerable time, the case being one in which a lady governess sued her former employer, an Edinburgh S.S.C., for declarator of marriage. Judgment has been given in favour of the defender. In the course of the opinion delivered by his lordship reference was made to a matter which is applicable not only to actions of declarator of marriage, but also can be applied to actions for damages for breach of promise of mar-

riage, viz., the impossibility of happiness being the lot of parties when the union is forced on the defender by process of law. His lordship's remarks were not explanatory of the reasons for refusing declarator, but were merely directed to showing how undesirable unions of this forced sort could be, for the law of marriage in Scotland does not, of course, concern itself with what takes place afterwards if it be clearly established that at a given time previously a marriage according to our law had actually taken place. In actions for damages for breach of promise of marriage the point of future comfort and happiness which have been lost by the pursuer is a point strongly dwelt on by counsel when seeking to obtain large damages from a jury. It might be thought that the converse is what counsel for the defender should dwell upon, viz., that, instead of seeking monetary damages, a pursuer ought to hold herself as being extremely lucky in having escaped from a union with a man whose false character (paradoxically, his true character) has revealed itself before rather than after marriage, but this would seem to be a somewhat risky line to adopt.

When the terms of the Geddes Report are made public it will most likely be found that a belief is entertained that economies can be effected in the administration of law and justice in Scotland, and that the Court of Session will not be overlooked as being a department on which expenditure should be cut down. As a department it is not self-supporting, for the money drawn by means of fee fund dues goes but a very little way towards meeting the large expenditure annually required to keep up the establishment; and if it is seriously believed in official quarters that any increase in the amount of Court dues leviable is going to bring the establishment a step or a fraction of a step nearer to self-support, that belief can only be put down to a pleasant tendency to harbour optimism, which tendency is liable to get the nasty jar later on when results come out. The litigating public represents no gold mine. To litigate at all, even with the co-operation of friendly agents, is a serious matter to contemplate in these days, and as Court dues mean actual cash outlays which must be met, no matter what happens to fees to counsel and agents, there is a backwardness exhibited in getting into lawsuits which is evidenced by the miserable amount of business coming into Court. Increase the Court dues a shilling here, a half-crown there and five shillings in another place, and what results? Potential litigants, already chary of starting lawsuits because of the difficulty experienced in finding cash to

meet printing and fee fund dues which must be paid, are not going to be encouraged by an increase in the latter. There has been some investigation made by the Committee presided over by Lord Blackburn as to a revisal of the dues which were fixed in 1896, and when the report of that Committee's deliberations comes out it may agreeably be found that the Court of Session can, by increasing its tariff, attract more custom than it has been doing of recent years. If so, the deliberations will have achieved very fine and unlooked-for results. Anxious people might, however, rather look for results to the Geddes Report, for there are many economies which could be worked out in the Court of Session. At present there is a full complement of judges and officials, while business is not in a prosperous state. It is true that a rush might come any day. It is equally true that a rush might not materialise. The staffing, let it be remembered, has been fixed to meet the requirements of normal times. Is the place overstaffed for present requirements, or is it just adequately equipped, and is each and every man pulling his weight? It would be manifestly unfair to have the Geddes axe applied ruthlessly according to the present state of business, because that state is abnormal, while liable to balance upwards as the country rights itself. The dread axe may not necessarily turn out to be a ruthlessly applied weapon, if fair and well-informed criticism of the Court of Session's requirements has been the guiding principle; and this much is certain, that, whatever may be the recommendations or suggestions made, there will be no violation of vested interests allowed to pass, for this is the place where such interests have ever been held sacred, which is but just, looking to the abandonment of professional careers which preferment has necessitated in all grades.

Including the cases called on this the last day of the year, being the recess box-day, the new summonses brought into Court during December amount to 135, and of these there are 48 divorces. Lord Anderson has received 43, the divorces numbering 22. Lord Ashmore has also 43, of which 16 are divorces. Lord Sands has 29, there being 9 divorces. Lord Blackburn has 11, there being 1 divorce, and Lord Hunter has 9, with no divorces.

During December the Inner House received 23 new causes, 18 going to the First Division and 5 to the Second Division. The 18 in the First Division consist of 13 reclaiming notes, 2 special cases, 1 appeal, 1 remitted cause, and 1 stated case

under the Workmen's Compensation Act; and the modest 5 received by the Second Division consist of 3 reclaiming notes, 1 appeal, and 1 remitted cause.

Notes from London.

THE TEMPLE, 31*st December*, 1921.

A REMARKABLE group of men, whose very names recall the memories of all their legal life to most lawyers still living, has departed from the earthly scene of their activities during the past month. Lord Halsbury has gone, and he has not actually attained that century of life to which, however, he made so near an approach. He has died at the age of ninety-eight. The second name of the group is Lord Lindley, a name perhaps not so widely known to lawyers and the public either in England or Scotland as Lord Halsbury's, but a name synonymous with legal greatness to all English lawyers. He has died at the age of ninety-four. The third is Sir Arthur Charles, who retired owing to ill-health from the bench of the High Court, where he was a puisne judge, so long ago as 1897. He had a most distinguished career both at the bar and on the bench, and if ill-health had not compelled him to retire he would in all probability have attained higher judicial office than he actually held. Yet, although he was laid aside from judicial work so long ago, he lived to attain the age of eighty-three years. This is, as has been said, a remarkable group, and to the present writer they embody all that lives in his memory of the past in connection with his life about the law courts and the Inns of Court. There never was a time since he knew anything of the legal profession when the names of these men were not household words amongst lawyers. Lord Lindley was a Lord of Appeal in the House of Lords when he brought his legal life to a close in 1905; and he had held judicial office altogether thirty years. He resigned his Lordship of Appeal in the same year that Lord Halsbury brought his third tenure of office as Lord Chancellor to a close. There was another coincidence in their careers. Lord Halsbury was called to the bar at the Inner Temple in 1850, and it was in that same year that Lord Lindley was called to the bar at the Middle Temple. They had both the advantage of being sons of distinguished men. Lord Lindley was the son of a famous botanist, Dr. John Lindley, who was Professor of Botany at University College, London. Hardinge Stanley Giffard, the future Lord Halsbury, was the son of a man who was a member of the bar, but was

more notable for his twenty-five years' work as the editor of the *Standard*, at that time one of the greatest journals in the greatest era of journalism.

Lord Halsbury never held judicial office until his first Chancellorship in 1886, and it was not until then that he began to assume that great place in political and legal life which he filled vigorously even into the days of the war; and shortly before the war he was one of the protagonists in the great political controversy that arose over the reformation of the House of Lords when, with surprising energy for one of his years, he became the typical and leading "die-hard," His reputation as a judge was all the time increasing until his terse and vigorous judgments held their own with those of the most eminent of his colleagues. Though there are stories in circulation as to certain misapprehensions he fell into, even of a ludicrous character, in dealing with chancery, or, as the English lawyers say, equity matters. As a lawyer, Lord Halsbury was distinctly a common law lawyer. In that respect he resembled his young successor, Lord Birkenhead, who became Lord Chancellor at an age when Lord Halsbury was still at the junior bar, and better known at the Old Bailey as an advocate than anywhere else, and had not yet even entered Parliament. It was through politics that both alike entered on that career of fame which ended as it did, as far as the law was concerned, in the highest position of the law, the Lord Chancellorship. Lord Lindley's career was altogether different, and it symbolised even more than Lord Halsbury's the development of the English law and the Courts during the last half-century. Curiously enough, Lord Lindley, though a Chancery lawyer, embodied more memories of the common law than Lord Halsbury, who was a common law lawyer. Lord Lindley laid the foundation of his legal reputation in a branch of law which was eminently a department of and administered in the equity courts. The famous text-book, "Lindley on "Partnership," appeared in 1860, and is still the leading authority; and his "Company Law" more widely still extended his reputation in Lincoln's Inn, the headquarters of everything in which Chancery lawyers are versed. When he took silk and became a Q.C.—a race of Victorians of whom few now remain —in 1872, it was in the Chancery Courts alone that he practised. But in 1875 a change had come. Common law and equity were fused, as it is usually put, though equity rules were in future to prevail where the common law clashed with them. It was thought that the Courts almost indiscriminately might be regarded as administering the two fused branches.

Equity judges who had never been in a common law or a Criminal Court in their lives were to try common law cases and go circuit. The experiment was tried, proved to be an absolute failure, and had to be dropped. To this day the two sides of the Courts known as equity and common law remain for all purposes of practice and advocacy as separate as they were in the days of Eldon or Lord Campbell. Lindley was appointed a judge of the common pleas under this delusion, as it might be called. There still existed then an order of men known as serjeants-at-law belonging to the ancient college whose members wore the badge of their order, the Coif, the most ancient of legal institutions then existing. They were all practitioners of the common law, in the very Court of Common Pleas, which was in an especial sense the home of the common law. They had there certain exclusive privileges as advocates over other members of the bar. When Lindley was made a judge the old rule still continued that every man who was to be appointed to the bench must previously have been created a serjeant-at-law, and don the coif and become a member of Serjeants' Inn. Its dilapidated, time-worn, dejected, and poverty-stricken hall may still be seen hidden in Chancery Lane at the back of one of those magnificent modern palaces which are mostly found to be the head offices of insurance societies. Thus Lindley became a serjeant-at-law, and when he died the last person on earth disappeared who had belonged to the Ancient Order of the Coif. Lindley in the common pleas proved a decided success and even as a judge in criminal courts, the only one of these trained in the tradition of Lincoln's Inn and the Chancery Courts, of whom this could be said. He subsequently became Master of the Rolls before his final transference to the House of Lords. As Master of the Rolls he was holding what had originally been, and was down to the time of the "fusion" of common law and equity, a distinctly Chancery judgeship. But Lindley succeeded a Master of the Rolls, Lord Esher, who was a common law lawyer, and nothing but a common law lawyer. This resignation was in 1897, and Esher had been the first Master of the Rolls I ever saw on the bench, unless I once caught a glimpse of one of the most famous of them, Sir George Jessel, sitting at the Old Rolls Court in Chancery Lane, now long wiped out or overlaid with modern buildings; and that glimpse was long before I myself became a humble member of the profession.

Sir Edward Clarke in his recent memoirs has thrown an interesting sidelight on the appointment of Lindley to the Mastership of the Rolls. He tells how Lord Salisbury first

offered it to him. He refused it, and told Lord Salisbury there were others better fitted than he to discharge its duties. It is plain from the offer to Sir Edward that the "Rolls," as it was generally called, had by this time ceased to be an equity judgeship. So that when Sir Edward spoke of others better fitted than he was to fill the post, he was not thinking of a Chancery lawyer particularly. He says he meant chiefly "my old friend, "Mr. Justice Lindley"; and a little later he was "delighted "to hear that he had been appointed." Sir Edward Clarke himself, who much more resembled Lord Halsbury than Lord Lindley, owed his advancement mostly to politics, but Lord Lindley was appointed to the Mastership of the Rolls, and to his subsequent office of Lord of Appeal purely on account of his legal qualities, as he had never any contact with politics. Although Lord Halsbury was the oldest of the three legal veterans, he yet did not pass from contemporary life so completely as one might have expected from his years. It was different with Lord Lindley and Sir Arthur Charles, and it is sad enough to admit, from these examples and others of eminent men in the Courts whom one recalls, that those who once knew them familiarly forget them while they still live. I remember being told by the editor of a well-known review that he had one week referred to "the late Sir Arthur Charles," and next week learned by a letter from Sir Arthur Charles himself that he was still living. He asked me if I knew that, and I had to tell him that I was not sure.

A short time ago I referred in this Review to Mr. Balfour Browne, K.C., who for many years had been the leader of the Parliamentary bar. What that means, or used at least to mean, may be inferred from the fact that he left an estate which in net personalty amounted to £652,636. In his early years he was eager for literary fame. He sent some specimens of his work to his fellow-countryman, Thomas Carlyle—Balfour Browne was of Kirkcudbright—who did not encourage him, but advised him to undertake some practical work. One wonders whether Balfour Browne was grateful or otherwise for the advice of the sage of Chelsea. Even Mr. Balfour Browne's pecuniary success at the Parliamentary bar was not equal, however, to that of an earlier leader of that bar, Sir Edmund Beckett, the first Baron Grimthorpe, who left a fortune of £2,111,775, mostly the result of his Parliamentary practice. Moreover, he obtained a peerage, and was in that respect more fortunate than Mr. Balfour Browne, who was understood to have been greatly disappointed at his failure. And yet he was fortunate in his day and generation. After

the war the palmy days of the Parliamentary bar departed, and Mr. Balfour Browne was the last of the leviathans.

The duel between Lord Birkenhead and Lord Carson in the House of Lords over the Irish negotiations recalls the criticisms which were made on Lord Robertson when in 1905, he being then the Scottish Lord of Appeal, made a furious attack on the Government in connection with Mr. Chamberlain's fiscal or tariff proposals, which caused defections in the Conservative party as the Irish proposals now do. At that time Mr. Alfred Lyttelton declared it to be "an ill-omened thing that a great "law lord should thus have detached himself from the calm-"ness and judicial moderation which have hitherto character-"ised the great office which he holds." The comment on this by one of the English legal papers was, "With these words we "entirely agree." And yet we have now both Lord Carson and Lord Sumner following the precedent which Lord Robertson set.

NOTES OF ENGLISH CASES.

THE following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

1. Club servants are not within the Act. *Re Junior Carlton Club*, K.B.D. 10th October. 38 T.R. 11.

2. Sale of future goods—repudiation—declaration that defender had repudiated a contract for purchase of 10,000 Lambs, and for damages. Defence that defender's letter did not amount to repudiation. Defence sustained. *Angliss & Co. Proprietary, Ltd.* v. *Greatrex & Co.*, K.B.D. 19th October.

3. Railway—strike—sale of perishable goods—consignment note—conditions. Apples were consigned subject to conditions on signed consignment note which referred to conditions on the back, and on separate posters. They were sold as perishable owing to the railway strike. *Held* that the conditions were binding, and exempted the contracting company and the company that sold. *Reader v. S.E. & C.R. and L. & N.W.R.* K.B.D. 17th October. 38 T.R. 14.

4. Railway—strike—perishable goods—Food Controller—Indemnity Act, 1920. Margarine was taken possession of by the Food Controller. *Held (a)* that he had no right to charge a commission, *(b)* that the railway company was protected by the Indemnity Act, No. 197 *supra*, 37 T.R. 897 referred to. *Van Den Berghs Ltd.* v. *G.W.R.*, K.B.D. 17th October. 38 T.R. 14.

5. Trade Union Acts, 1871, sec. 4 (4), 1913, sec. 3 (5)—A national federation trade union (unregistered) resolved to expel a local trade union (one of its members). *(a)* Injunction refused for

want of jurisdiction; *(b)* one trade union may be a member of another. *M'Cluskey (Glasgow and District Glass Bottle Makers Trade Protection Society)* v. *Cole (National Federation of Glass Bottle Workers)*, C.A. 20th October. 38 T.R. 20.

6. Mortgage — Compound Interest — Income Tax Act, 1918. Schedule D, case 3. *Held* that the compound interest was subject to deduction of income tax. *Re Cravens Mortgage*, 1907, 2 Ch. 448, followed, *re Morris, Mayhew* v. *Halton*, C.A. 24th October. 38 T.R. 27.

7. Privilege of the Crown. Interpleader. The Crown cannot be made a party. A petition of right is necessary. *The Mogileff*, P.D. 8th November. 38 T.R 71.

8. Contract for repair of a vessel on a slip. Clause exempting from liability for accident or damage. Negligence. *Held* that there had been negligence, but that the clause covered it. *Reynold's* v. *Boston Deep Sea Fishing & Ice Company, Limited*, K.B.D. 24th October. 38 T.R. 22.

9. Gaming Act, 1835, sec. 2—bet. Payment of a cheque by the loser's bankers on presentation is "actual payment," and the amount may be recovered by the loser from the gainer. *M'Lean* v. *Clydesdale Banking Company*, 1883, 11 R. (H.L.), 9; A.C. 95, referred to. *Sutters* v. *Briggs*, H.L. 25th October. 38 T.R. 30. *Note*—Does this Act apply to Scotland?—Bell's Principles, sec. 325.

10. Medical Act, 1858, sec. 32, does not prevent the recovery of fees for osteopathy. *Hall* v. *Trotter*, K.B.D. 25th October. 38 T.R. 30.

11. No. 165, *supra*, 37 T.R. 712, reversed. Sale of Goods Act, 1893, sec. 14. Mineral waters sold for use in Argentina were condemned by the authorities there for containing salicylic acid. *Held* that the seller could recover the price from the buyer as the latter did not rely on the former's skill or judgment, there having been previous similar transactions. *Simmer, Perniam & Company, Limited* v. *Webb & Company, Limited*, C.A. 26th October. 38 T.R. 45.

12. No. 178, *supra*, affirmed. Contracts promoting illegal or immoral acts not enforceable. *Strauss & Kahn* v. *Platt and Others*, C.A. 27th October.

13. Hire purchase agreement—sale by hirer before repudiation. The hirer of a piano sold it when not in default of the hire payments. The purchaser in good faith had returned it to the hirer on learning that it was on hire purchase. The hirer then made away with it and it could not be traced. *Held* that the purchaser was not liable for conversion. *Nelson Murdoch* v. *Wood*. K.B.D. 17th October. 38 T.R. 23.

14. No. 148, vol. xxxvii. 37 T.R. 687, affirmed. Increase of Rent, &c. (Restrictions), Act, 1920, secs. 12 (9), 13 (1), 14 (1). Conversion of three dwelling-houses into a factory. *Held* to be a new building, and previous standard rents not to apply. *Phillips* v. *Barnett*, C.A. 21st October. 38 T.R. 39.

15. Secret arrangement between seller and buyer's agent to share profits. *Held* that this vitiated the contract, and that the buyer was entitled to recover his deposit. *Alexander* v. *Webber*, K.B.D. 19th October. 38 T.R. 42.

16. Sale of Goods Act, 1893, sec. 18, rule 2. Sale of fixtures—passing of property. An engine was sold free on rail. It was injured in being dismantled and the buyer refused to accept it.

Held that the risk was with the seller until it was put on rail, and that the buyer was entitled to reject. *Underwood, Limited* v. *Borough Castle Brick & Cement Syndicate*, C.A. 27th October. 38 T.R. 44.

Appointments, Business Changes, &c.

Dingwall.—Mr. T. S. H. Burns, M.A., LL.B., solicitor, Dingwall, has assumed as a partner his son, Mr. Thomas H. Burns, solicitor. The business will in future be carried on under the firm-name of T. S. H. Burns & Son.

Galashiels.—The firm of Messrs. W. A. & F. Rutherford, writers, has been dissolved by the retiral therefrom of Mr. Frank Rutherford. The business will be carried on by Mr. Wm. Rutherford and Mr. John Smith, under the firm-name of W. A. & F. Rutherford.

Glasgow.—Messrs. Downie, Aiton & Co., 190 West George Street, have assumed as a partner Mr. James Allan, solicitor, Dumbarton. Mr. Allan's office at 1 Strathleven Place, Dumbarton, is being retained for local consultation. The business will be carried on under the present firm-name of Downie, Aiton & Co.

Mr. Donald Currie, solicitor, 34 West George Street, and Mr. Norman Carrick Anderson, solicitor, 144 St. Vincent Street, have entered into partnership. The business will be carried on at 34 West George Street, under the firm-name of Currie & Carrick Anderson.

Faculty of Advocates.—Mr. James Frederick Strachan, M.A., LL.B., Glasgow, has been admitted to the Faculty of Advocates.

Law Agents for the Poor.—A deputation representing the Forfarshire Society of Procurators recently drew the attention of the Lord Advocate to the grievance which the legal profession suffered in being compelled to undertake free of charge the work of agents for the poor. The Lord Advocate said he was entirely in agreement with the view of the solicitors, but he remarked that the difficulty would be to get the Treasury to agree to spend money at the present time. The deputation pointed out that it was proposed to lay the burden on Parish Councils in the same manner as Parish Councils had to maintain the poor. It would be an infinitely small burden on each of the Parish Councils as compared with the heavy burden it was on the members of the legal profession. The Lord Advocate suggested that representations be made to the Secretary for Scotland on the matter.

Edinburgh.—At a general meeting of the Society of Solicitors in the Supreme Courts, the following appointments were made:—Reporter on *probabilis causa*, Mr. D. L. Addison Smith; agents for the poor (in civil causes), Mr. W. Melvin Ross and Mr. George Forsyth; (in criminal causes) Mr. Russel Patrick and Mr. David C. Buchan. Mr. William Charles Dick and Mr. Alexander Hodge Mitchell have been admitted members of the society

The following have been admitted members of the Society of Writers to the Signet:—Messrs. Robert Tedcastle, William Waddell Learmonth, John Richardson, and Thomas Patrick Spens.

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STIRPITAL SURVIVANCE.

QUITE an unusual stir has been made over the decision of the House of Lords in the case of *Curle's Trustees* v. *Millar* (18th November, 1921, 2 S.L.T. 262). Three things are alleged against the decision, namely, that it is (1) novel; (2) unconstitutional; and (3) wrong. In our opinion all those charges are unfounded.

Under a will the residuary fund was to be held upon the following trusts:—*Clause No. 1*: "For behoof of" the testator's three named children A, B, and C equally, "the said shares "being to be retained and invested as hereinafter mentioned: "that is to say, I direct my trustees to hold" the shares for A, B, and C in liferent only, and for their respective issue in fee as the parents might appoint, which failing then equally. *Clause No. 2*: If A, B, and C or any of them died without leaving issue, or if such issue died before majority or marriage, the trustees were "to retain the said shares for behoof of the "SURVIVORS of A, B, and C equally, if more than one, and in the "event of only one surviving, for his or her behoof, in the same "way as is hereinbefore provided with regard to the shares "originally taken by the survivors or survivor in their own "right." *Clause No. 3*: If A or B or C predeceased the testator leaving issue, such issue were to take the shares which their parents would have liferented. *Clause No. 4*: In this last case if no issue, then to the survivors of A, B, and C and the issue of predeceasers. *Clause No. 5*: "Failing any survivor of A, B, and "C or issue of any of them, I direct my trustees to pay over the "said shares of A, B, and C to their nearest heirs and representatives in moveables."

A, B, and C all survived the testator. A died in 1909, leaving issue. B died in 1916, unmarried. C survives, and has issue. A's issue take the capital of the one-third share which he

liferented. C has the liferent, and C's issue will take the fee, of one-third, plus one-half of what we may call B's share. That leaves, undisposed of, the other half of B's share. The only question in the case was—shall it go (1) to C in liferent and C's issue in fee, or (2) to A's issue in fee? In other words, is the whole capital of the residuary fund to go (1) one-half to A's issue and one-half to C's issue, or (2) one-third to A's issue and two-thirds to C's issue?

Lord Blackburn decided in favour of A's issue. A full bench of the First Division unanimously reversed. The House of Lords, consisting of Lords Atkinson, Shaw of Dunfermline, Sumner, and Wrenbury have unanimously restored Lord Blackburn's judgment, though apparently not on exactly the same ground.

C and C's issue (who have ultimately lost) founded on the plain and natural meaning of "survivor." On B's death in 1916 without issue his share was destined to "the survivors" or to the "only one surviving," for his or her behoof, &c. Now, in 1916 A had been dead for seven years, and C was "the only one "surviving" of the testator's three children. Therefore *cadit quæstio*; so ran the argument.

A's issue argued that this literal interpretation would defeat the expressed intention as that could be gathered from the whole will. They invoked the rule of "stirpital survivance," which means that in certain circumstances a requirement of A's survivance is satisfied by either the actual survivance of A in the flesh or the survivance of his stirps in the persons of his issue.

Alternatively, they argued that "survivors" must be read as "others," which, they said, "is only another way of stating the "doctrine of stirpital survivance"; but that is by no means to be taken for granted.

Novelty.—It may be admitted that substantially, if not absolutely, "stirpital survivance," as a law term, is a novelty in Scotland. It may also be that the testamentary expressions which have in this case led to "survivors" being held to include the stirps of one who was not a survivor, but on the contrary a predeceaser, were different from those on which previous similar decisions have turned. But these are the only senses in which the charge of novelty is true. Not, indeed, that a legal doctrine is any the worse for being new, or even for having been accepted in another country, even if that other country be England, before it is accepted into our law. As instances we may cite the personal and individual liability of trustee-shareholders and the disability of a solicitor-trustee to make profit charges without special dispensation in the will or settlement. It is true that in the opinions delivered by the Law Lords there

is no citation of any Scottish case in which the doctrine, or any equivalent, has received effect. Indeed there is next to no citation of authorities at all; and perhaps this is a recommendation, as avoiding what Lord Halsbury condemned as the obnoxious habit of interpreting A's will by B's will. At any rate the only Scottish case quoted is *Ward* v. *Lang* (1893, 20 R. 949), where the doctrine was *not* applied. But it is impossible to maintain that the rule or doctrine is a stranger in our law. In *Ward* Lord Kinnear said that before the rule can be invoked—

> It is necessary, in the first place, to find from the indications in the will, apart from the clause immediately under construction, some reason for holding that the literal language of that clause is inadequate to express the full meaning of the testator, and then to find in the will some clear indication of an intention to do something different from what a literal interpretation of the clause would infer.

Expressing the rule in a more applied form, and according to its previous applications, if there is a trust for A and B in liferent and their respective issue in fee, and failing either of them without issue, then to the *survivor* in liferent and his issue in fee; and failing *both* A and B and their issue, then over to X, the word "survivor" shall be read in a "stirpital" sense so that if either A or B, say A, dies without issue, the one-half of corpus thus set free shall go to B's issue, though B predeceased A. The destination over to X is here the indication required by Lord Kinnear to be found in the will outside of the immediate clause under consideration. That destination *expresses* an intention that X shall not take anything unless issue of both A and B fail. Then the will as a whole discloses an intention to take as the legatee-units, not the individuals A and B, but their respective stirpes, including themselves no doubt, but also including their respective issue. In these circumstances the rule of stirpital survivance is applied, so that the apparent requirement of the survivance of B is construed as requiring, and is therefore satisfied by, the survivance of his stirps.

Now, as to the Scottish authority to displace the charge of novelty. At the outset we feel that it is somewhat superfluous to go into detail, for the very good reason that Lord Blackburn gave his judgment avowedly in accordance with Inner House precedent binding upon him, but he did so "with no reluctance," not only because he evidently felt no repugnance to the rule, but specifically because he thought that the express language of the will disclosed a testamentary intention negative of the "apparently capricious result" which the rejection of the rule would have entailed. The previous Scottish authorities are—

Aberdein v. *Aberdein's Trustees* (1870, 8 M. 750). The trusts

were for two sons equally in liferent; on the death of either leaving issue, the issue were to take the parent's share; if the first deceaser left no issue, his share was to accrue to the *survivor* and his issue; and if *both* sons died without issue, then over to charities. The first deceaser left issue; the second deceaser did not. The Second Division held that the share of the second deceaser went to the issue of the first deceaser, and not to the charities. This, as we understand it, is exactly the kind of case to which the rule of stirpital survivance has usually been applied, and it shows exactly how the rule works. It may be said to put a gloss on the word "survivor." We state this, however, with deference, for in *Curle's* case the Lord President was emphatic that *Aberdein* was not a case in which "survivor" had been read as "other," or which could in any way support the doctrine of stirpital survivance. His lordship explained it as "a "pure case of gift by implication." As to that it would appear from what is, and also from what is not, contained in the House of Lords' opinions that their lordships do not look with favour either on the idea of translating "survivor" into "other," or on implied gift, and in one of the English cases (*Wake* v. *Varah*, 1876, 2 Ch.D. 348) one of the judges expressly said that the language of the destination over (we think substantially the same as that in *Aberdein*) would not support an implied gift; yet stirpital survivance prevailed.

Paterson's Trustees (1894, 21 R. 253). A sum of money was directed to be paid to A and B equally, the issue of either or both predeceasing to take their parent's share, and in default of such issue then to the survivor of A and B and the issue of the survivor, "whom *all* failing," then over to residue. A and B both predeceased the testator. A died first, leaving issue; then B died, leaving no issue. The contest for B's share was between A's issue and the residuary legatee, and it was awarded to A's issue. This was a judgment of Lord Stormonth Darling and the Second Division (Lord Rutherfurd Clark dissenting). It seems to be just *Aberdein* over again. It was stated from the bench that the terms of the destination over made a free construction of "survivor" not only admissible but "irresistible."

Forrest's Trustees (1884, 12 R. 389). There was no destination over, and therefore it was thought that the rule could not apply, but Lord Shand expressly left open the question whether "the effect of the terms in which a gift over is made ought to be "to control the destination of accrescing shares to survivors."

Ward v. *Lang* (*supra*) Lord Kinnear said—

> The reasoning on which [the English cases] were decided appears to me, if I may respectfully say so, to be very convincing, and if it were

applicable to the will we are construing, I should have no difficulty in following these decisions.

M'Laren on Wills. We purposely quote from the 1st edition (1868)—

Whether issue take as survivors or only as original legatees.—The subject is fully discussed in the immediately following chapter on survivorship from which it will be seen that the authorities are not unfavourable to the claims of issue, succeeding under the implied condition, to take what would have fallen to the parents by way of survivorship as well as in the character of original legatees (p. 674). . . . Whether by inadvertence or design it frequently happens that clauses of survivorship make no mention of the issue of predeceasing legatees, and the question thus arises whether issue can be held to be included in a clause of survivorship by implication (p. 681). . . . Where the will makes provision for the contingency of the death of some of the legatees without leaving issue, by giving their shares to the survivors, but contains no expressions showing that the contingency of the death of other legatees leaving issue was present to the mind of the testator, the issue of a predeceasing legatee are clearly entitled to the benefit of the implied condition, and there does not appear to be any reason for confining the right of the issue in such a case to the parent's original share. . . . Accordingly in the absence of expressions showing that the contingency of issue being left was present to the mind of the testator when he gave over the estate to the survivors of the original legatees, issue have uniformly been admitted to participate with survivors in the gift over (p. 686).

Finally, in this very case of *Curle,* we have the following dicta in the Court of Session:—

Lord President.—This further refinement [stirpital survivorship] has not, however, been hitherto *expressly* adopted in this country.

Lord Mackenzie.—It may be that the doctrine of stirpital survivance may be invoked in Scotland in some future case if and when the language of the deed requires it. I think there is no room for it in the present case.

Lord Skerrington.—In referring to a settled share, where the interests of the stirps are of course predominant, it is not unnatural that a testator should slip into inaccurate language, and should include within the description of children who survive a particular event, a child who, though dead at that date, has left a family to represent him. In every case of this kind the question is whether the context of a bequest to survivors, and the general scheme of the will, or either of them, afford conclusive evidence that the bequest was intended to benefit every child of the testator *who should survive a particular event, either in his own person or in that of a descendant.*

We submit that we have adduced evidence amply sufficient to refute the suggestion that the decision of the House of Lords has introduced into the law of Scotland anything essentially novel. The same idea has been judicially recognised in Scotland both in cases where it seemed right to apply it and in cases where it did not. The terminology has not always been the

same, and even yet that verbal issue seems not to be disposed of, but that is not material.

Unconstitutional.—We should not mention this suggestion if it were not that it has been set out, apparently seriously, in another law review. The suggestion is that the decision has displaced a Scottish judgment based on Scots law properly understood and applied, and has done this by importing into a Scottish suit a rule of purely English law, which is not the law of Scotland. Whereupon it is further said that, therefore, the decision is a breach of the treaty of union, whereby the laws of Scotland were to be preserved inviolate. The evidence stated in the previous part of this article is conclusive in defence here also. Is it likely that Lord Blackburn and Lord Shaw of Dunfermline would play the part suggested? And what of the other eminent Scottish judges from whom we have quoted? Nay, by a happy chance, the dates so stand that the Scottish case of *Aberdein* (*supra*) was decided two years before the earlier of the two English cases the rule of which, it is said, has been forced upon the Scottish people in violation of constitutional right and principle. The point need not be laboured further.

Wrong.—When four Court of Session judges take one view, and one judge of that Court and four Lords of Appeal take another view, it goes without saying that the question must be difficult and highly disputable.

Four important rules may be stated as fully recognised in or consistent with the Lords' opinions. Those are—(1) "Surviving" naturally means personally and individually surviving in one's own proper flesh and person; (2) that natural meaning shall stand unless clearly displaced; (3) the alternative of intestacy is not enough to displace it; nor (4) the mere desire to avoid an unreasonable disposition of the testator's estate.

There was an argument on clause No. 4 to the effect that it showed, by contrast with clause No. 2, that when the testator meant to include issue of predeceasers he knew how to do it, and did it expressly. This argument received no weight in the House of Lords. If we may say so, it seems to us that it is the kind of argument which is specially apt to appeal unduly to the cautious solicitor-mind. Along with this instance we may recall the recent case of its rejection by the Court of Session where in articles of association of a company one class of shares was stated to be entitled to a "cumulative preferential dividend" and another class to be entitled to a "preferential dividend"; it was unsuccessfully contended that the latter was not cumulative in accordance with the ordinary implied rule. More cognate to the present question is the case of *Neville* v. *Shepherd* (1895,

23 R. 351). There was a gift to a class with no conditional institution of issue; a destination over to take effect failing *all* the members of the first class *without leaving issue;* and in another part of the will, which did not take effect, there were references to issue taking original and accresced shares. The First Division held that, in dividing the fund among the first class, issue of predeceasers were entitled both as original legatees and as survivors. The *expressio unius* was *not* the *exclusio alterius;* on the contrary, the *expressio* was used as a guide. Otherwise the case is really another prior authority for the stirpital interpretation, but only by virtue of the terms of the ultimate destination over.

That destination over, which we have at the outset of this article called clause No. 5, requires fuller notice as regards the treatment given to it in the judgments. Lord Blackburn's judgment was wholly based on that clause, and on the view that it applied to the whole will and was not confined in operation to a failure under clauses Nos. 3 and 4. In the First Division all the judges held that No. 5 was merely pendent on Nos. 3 and 4 and could not be taken as referring to a failure under No. 2. The Lord President developed this fully, and described it as of "crucial importance"; so much so, that it may almost be inferred that, on the contrary view, his Lordship's decision would have been in accord with that of the House of Lords. This was very nearly Lord Skerrington's position also. Not one of the judges in the Division stated that, even if clause No. 5 could be taken along with clause No. 2, still "survivors" and the "only one "surviving" must be literally read. All this was greatly changed in the Lords. Lord Wrenbury alone laid stress on No. 5. The other law lords seemed to be able to dispense with it, and so indeed did Lord Wrenbury, but it does not clearly appear whether the others thought that clause No. 5 applied at all. This brings us to the essence of the case, and we should put it thus—1. If the final destination over (clause No. 5) applied, the Lords' decision—that is to say, the result of it—is clearly, and perhaps we may almost say admittedly, correct. It is then plainly in accord with previous Scottish authority. Also then, however, it may be denied that it turns on stirpital survivance at all, for it may be explained as merely an example of implied gift. With great deference we express the view that clause No. 5 did apply, and therefore we welcome the Lords' decision in its result. 2. If the case is to be taken independently of clause No. 5—and it is not clear that the House of Lords did not so take it, indeed, it rather appears that they did so take it—we are at once up against the question whether it can be an

example of stirpital survivance. We say so because Lord Blackburn was clearly of opinion in the negative on the assumption stated, and also because that was equally clearly Lord M'Laren's view of the English decisions (Wills and Succession, 1st ed., 681). But these must yield, for the law lords expressly describe it as stirpital survivance, and on that we say two things. In the first place, assuming such a doctrine at all, it would be strange if the law knew only one *indicium* of its existence, and clearly Lord Kinnear did not view it in that narrow way, for all that his Lordship postulated, as the condition of departing from the literal meaning of "survivors," was a suitable gift over "or *any* "positive expression of intention." In the second place, Mr. Curle's was a very peculiar will, even for Scotland; we do not remember to have seen any other similar. It was typically of the nature of a family settlement, where, as Lord Skerrington says, "the interests of the stirps are of course predominant," and it exalted the stirpital idea to a degree which in our experience is unprecedented. With great respect it seems to us that Lord Shaw struck the keynote of the whole case when he singled this out at once and described it as "paramount." Trusts for liferent and fee are common enough. So is an initial absolute trust for a daughter, followed by a clause cutting it down to a liferent in the interests of her issue as fiars, and introduced by "but declaring" or similar words. But that is not Mr. Curle's will at all. He declares a trust "for "behoof of" his immediate children, and then proceeds to explain that what he regards as, and means by, "for behoof of" a child is a trust for that child in liferent and that child's issue in fee. His ideas of family polity and stirpital economy may have been right or they may have been wrong, but in any case he held them and was entitled to express them, and in his will he did so. Thus we have it declared that, whenever we read "for behoof of" an immediate child of the testator, we are to understand that the reference to the child, by name or otherwise, is the testator's conventional label for importing that child's stirps. As Lord Shaw says, this is "the idea and . . . the prescription of the will." But to make it still clearer the interpretation of "for behoof "of" is repeated in clause No. 2 by an express reference back to clause No. 1. Accordingly, as Lord Shaw further says, the *indicia* demanded by Lord Kinnear and Lord Skerrington are presented in this peculiar will as thus understood. This understanding we very respectfully accept, and so also we very respectfully welcome the Lords' decision, not only in its result, but also in its ratio, and without the aid of clause No. 5.

As a change from these abstruse and recondite issues we

conclude by the practical note that the anxious discussion in *Curle's* case in the Court of Session, regarding the true rôle of what we have called clause No. 5, lends force to the suggestion that in wills (and for that matter in many deeds also) there would be advantage in adopting the form of numbered paragraphs. But no doubt even that could be blundered.

THE PROFESSION OF THE LAW.*

II.

Efficiency is a word which has frequently recurred in the course of these observations. What does it mean in relation to the profession of the law? The profession is sometimes spoken of as a trade union. This is but a specious and vulgar analogy at the best; but in the matter of ideals of efficiency it is wholly perverted. For the essence of professional efficiency is the exact opposite of the modern trade union spirit. The lamp of a professional man's ambition is, or ought to be, to realise the desire to give of the best of himself to the work which his client puts in his way. If the profession's attitude to its work were ever to be that of giving as much as it pleases, or as little as it can, for the largest reward it can exact, its capacity for service would be destroyed, the fascination which it holds for its *alumni* would be eclipsed, and its privileges would be forfeit. Rightly so, because it would have forgotten its public trust, turned wholly to the least admirable ways of commercialism, and proved a renegade to the high calling which, as we have seen, it enjoys. In former days the skilled artificer in stone was wont to chisel his particular mark on each fragment of his handiwork, and the ruling principle of professional ethics is much the same as that which made the fifteenth century mason not only take an interest in his work for the sake of the necessary wage it brought, but also take a pride in it for its own sake. Professional ambition in the law is indeed destitute of the incentive which the power of bequeathing to prosperity even such humble memorials of accomplishment as the mason's mark affords. One of the peculiarities of the professional lawyer's work, however serviceable it may have been in itself, and however brilliant may have been the manner of its performance, is that it leaves no tangible memorial behind it. The conveyancer perhaps may point to some registered masterpiece of draftsmanship which will survive him and declare in its testing clause his name and authorship to the curiosity of later generations; though I do not suppose he counts

* Inaugural Address to the Edinburgh Juridical Society by the Rt. Hon. Lord Clyde, Lord Justice-General, on 28th October, 1921.

much on that. But the pleader, no matter how outstanding his merit, leaves no permanent memorial of his skill in any shape, however insignificant, behind him. His speeches, even if they are sometimes set up in type, are not what is known as literature, and their merits hardly consist in their literary qualities. The poet, the author, the artist in marble or in paint, the architect, and the engineer survive in their own work; and each succeeding epoch can compare its best with it, and find how increasingly difficult it is for man to do better than man has done already. But the creations of the pleader are like those of the actor, they vanish at the finishing touch, and leave no record but in the enthusiastic memories of their casual audience. These fade and die with those who held them, and soon nothing remains but the echo of his name silently reverberating in the dark recesses of forgotten practiks and antiquated reports. At least so it seems. But it is not wholly so. Because the sources of professional efficiency are to be found neither in ability alone, nor in ability allied with learning and industry, but in these qualities informed and directed by the honourable traditions of the profession. It is and always has been a point of honour in the profession of the law to give of one's best to the performance of duty; and high traditions are the sinews of honour. To these traditions each worthy exponent of professional qualifications makes by his life and his work a subtle contribution which silently but permanently enriches the traditional heritage of his successors. *Quasi cursores lampada tradunt.* The soul of professional efficiency is honour pursued with courage. Modernised as are the trappings of the profession of the law it still retains much of its ancient place and dignity, and survives something of an aristocrat among the professions of a democratic age. If an aristocracy is to protect itself against internal decay and outward assault, it is above all other things necessary that it should observe the motto inscribed on its privileges—*noblesse oblige:* and the best piece of advice that can be given to an intrant is—never spare yourself. If he should ask the reason why, explain to him that he is in honour bound. I should be the last to disparage the qualities of intellect, and, of course, without some measure of them professional efficiency is out of reach. But the essentially human and practical character of professional work render them only a part, and not the master part, of professional qualifications. Intellect after all is not a power but an instrument, and whatever people may say, the art of using it is not by any means necessarily acquired by educating it. One would have thought that the ordinary product of school and college, even as these

existed in Scotland before the seventies, provided examples enough to prove my doctrine. I have always suspected that those who talk of education as the means of the salvation of modern society and a transformer of the modern community, are forgetting that school and college concern themselves mainly, if not entirely, with the education of the intellect, while it is not intellect but courage and honour—in a word, character—that makes a man and moves the world. I do not see, for instance, why education should be expected to do for modern democracy what education—far higher and more widely diffused than is possible in a community of millions—failed to do for the democracy of Athens. Meanwhile we spend our money on the pursuit of it almost as lavishly as on the pursuit of pleasure, and cherish a forlorn hope that the pursuit of the one will prove less disappointing, though it bids fair to be no less expensive, than the pursuit of the other. My own impression is, that higher education bears its proper fruit when it is the result of the stimulus of character to acquire it, and that it produces a crop of rotten apples when it is made the subject of forced cultivation and social method. But, however this may be, the point is that—much as the profession owes to the quality of the brains which it attracts to its service—it depends far more on the originating force of character displayed by its members and their fearless pursuit of perfect honour. I have never forgotten a lesson I learned early at the bar, when I consulted the Dean about some professional perplexity or other in which circumstances had placed me. In my inexperience I said something about professional etiquette. My remark was greeted by a gust of diaconal indignation. "What "in the world," exclaimed the Dean, "do you mean by etiquette. "There is no such thing known in your profession. In each "case of difficulty choose for yourself the line which seems to "accord best with the highest standard of honourable conduct "you know, regardless of any other consideration, and you will "never go wrong." I remember, too, the scorn with which another Dean put aside a suggestion that the decisions pronounced by holders of his office on points of conduct should be made the subject of record. Rightly, of course, because the service of honour is not in regulated bondage, but in perfect freedom. Those of us who saw and knew them will never forget the impetuous mastery of the law which placed Mackintosh at the head of his profession, the faultless skill of Balfour's invincible sword play, or the profound generalship which made Asher's enveloping tactics irresistible. Time plays tricks with the focus of memory, I know; and these men will never lose, for those who were their juniors, the proportions in which they saw them as the

giants of those days. But that which makes the recollection of their achievements not merely a treasure but an inspiration is not so much our despairing admiration of the intellectual powers they commanded, as the respect and affection we learned to cherish for their characters as men, and the perfect rule of professional conduct of which they gave us the example.

One of the highest qualities of the best kind of professional mind, and that which is the most difficult of attainment, is the quality known as breadth, in default of a more precise and illuminating description. Breadth, I fancy, is rooted in the knowledge of the restrictions which confine all human knowledge, and of the fallibility of much that passes for knowledge even in the profession's own science of Right, and in the legal doctrines it endeavours to expound and apply: but it derives even more from the conditions under which it is best developed and ripened, those, namely, which are provided by the experience of a man of the world. Not many of the principles and generalisations invented by the brain of man come through the test of experience preserving the pristine edge and polish they possessed when fresh from the intellectual workshop. They have an awkward habit of coming into conflict with each other, for one thing: and the shallow confidence which inexperience encourages in their use is constantly being disappointed by some subtle and hardly-noticed change in the texture of the material on which they are employed. The broad mind learns the lesson of their use, and is neither arrogantly confident of the results produced by their means, nor disappointed when they prove inefficient instruments in the hand. The lesson is that the sound ones are the few that never break because they are tough enough to bend; a lesson which is hard—sometimes almost heart-breaking—for the lawyer to learn. For it is a fact, as disagreeable to acknowledge as it is unfortunately undeniable, that the study and practice of the law have a certain tendency to narrow the outlook of those who pursue them. When the machinery of industry and commerce attains the vast proportions which it has reached in these days, it need cause no surprise—though it may well form ground for alarm—that the wage-earner in industry loses hold of the significance of the part which his minutely subdivided task plays in the highly interdependant system of national production, and does not feel the force of those reasons which should make him scruple to throw that organisation out of gear. And it is perhaps no wonder if the innumerable details which encumber the performance of the professional task, and to every one of which the exact attention of the professional lawyer is continually demanded, make it

almost as difficult for the strenuous practitioner to get his work into right relation with the broad horizons of his profession, as it is for the wage-earner to appreciate truly the economic responsibilities of his citizenship. There is always the old difficulty of seeing the wood on account of the trees. And the familiar taunts thrown at a "legal mind" and a "lawyer's view" have something more serious in them than just a sneer. We owe it to the profession to redeem ourselves from the implied accusation and from the tendency which exposes us to it. I say we owe it to the profession because the effects of the tendency are not confined to the general attitude of mind. They taint and deteriorate both our work and our methods. Every pleader knows the temptation of special pleading, and it is not merely in the stress of contentious argument, but in the mode of thought and in the manner of legal conception that the temptation to resort to the small and the superficial, assails and sometimes conquers him. I say as much, not as one who has been, or is, either immune from the temptation or guiltless of falling into it; and the same reflection applies to the treatment of matters of fact as to the discussion of propositions in law. It has often been a humiliation, in the course of my own experience, to read one's own examination or cross-examination of a witness, and to realise how lack of breadth had betrayed one into wasting titanic efforts on lilliputian points, instead of sinking them in a concentrated attack on the main issues. Again, every professional adviser knows (even though he disdains to follow) the lure offered by the facile achievement of petty scores against his adversary—a lure which entices to the adoption of clever device and so to the less reputable by-ways of professionalism. And every counsel of experience knows an equally dangerous form of the same temptation, when, under the pressure of a client's predicament, and besought to confirm the adoption of a doubtfully sound expedient which offers the client a sorely needed escape from his probably undeserved perplexities, he persuades himself to acquiesce in a narrow view of the situation—a chancery view, as some people derisively call it. When he signs the opinion, his better judgment whispers the condemnation he deserves—*haeret in cortice qui haeret in litera*: he has excluded from the light some of the rays which compose it, and preferred to see plain things in strange colours. Thus can the Sale of Goods Act be mistaken for the Law of Sale, the Feudal System be lost in the Titles Acts, and solid realities be sunk behind a thin mirage of our own creation. There is no excuse for this perversity in Scotland, and no room for indulgence in it in our practice. It is

the boast of our national jurisprudence that its law is equity and its equity law. Our conceptions of legal principle must be kept in harmony with the wholesome counsels of broad mindedness, and our applications of legal principle must be kept under their control. It is the same whether we are called to the duty *offensiones aut injurias cognoscere,* or invited *quod aequum sit inter vicinos decernere.* It would bode ill for the successful handling of our Scottish legal institutions, if we ever failed to find in the members of the profession that happy blend of the jurist and the man—that favourable conjunction of trained intellect and courageous honour—which, besides endowing our national jurisprudence with its peculiar flavour, has been a distinguishing mark of so many of its leading exponents, the charm of whose personalities it has consummated with a mellowness all its own. The truth is that the activities of the professional lawyer, concerned as they are with all sorts of human affairs, nevertheless form somehow a little world by themselves. It is only too easy for him, though living in the world, not to be of it. In fact, the kind of experience which produces a man of the world too often does not come his way. Besides, the yoke of his profession lies heavy and his task absorbs him; and, as the demands of practice grow, his opportunities of leisure find him with less and less energy left for anything but the enjoyment of his holiday. The result is that, except in the case of individuals very happily constituted, what I have called the horizons of the profession recede into the dim distance. It may not seem to matter from the bread and butter point of view; all the more reason, it seems, why he should resign himself to lose sight of them altogether. But there is vital danger in such apathy; for, whether he is conscious of it or not, commercialism is claiming him for her own. If what I have said in the earlier part of this address has not been spoken altogether in vain, it is manifest that the profession does not flourish only by the bread it makes, any more than man himself lives on that commodity alone. On the contrary, the profession must starve alike in efficiency and in reputation if it allows itself to become sequestered and out of touch with the large spaces of life in the big world outside its own. The mass of people know the quality and power of the law only through their practical contact with it, and the effect of that contact depends very largely on the personality of the professional men they come into relation with. A profession wholly or mainly composed of men with restricted views, and with none higher than commercial ambitions, would

not merely justify the sneers which are sometimes thrown at it, but would bring the law itself into deserved contempt.

How, then, is this cramping spirit to be exorcised? Excursions in the field of letters offer a wholesome and an attractive tonic for a mind rendered anæmic by the narrow exclusiveness of professional practice. From time immemorial the connection between the profession of the law and the field of letters has been close. But, in modern times at least, practice and literary pursuits have not been good companions; and the fact that not a few professional lawyers have made excursions into the field of letters, gathered laurels there, and even settled in it, holds no encouragement for the serious practitioner. The law is, as we are constantly reminded, a jealous mistress, and eyes with suspicion a suitor who strays into the flowery garden of the muses. After all, letters are at best but a second-hand road to knowledge of the world, and any amount of acquaintance with other people's recorded experience is only half so humanising as actual experience of one's own. It is true that, in the old days, the giants of the profession, almost all of them, dabbled in letters. There are reams of passable hexameters to their credit, and volumes of philosophical polemics which testify to a sustained familiarity with Aristotle which very few modern professional men can pretend to. But these accomplishments were the result of a scheme of education which involved attendance at the greatest seats of classical and philosophical learning in the continent of Europe, and were the common possession in those days of men of talent and position. The truth is that letters do not meet the requirements of the case in an age so intensely practical as our own. Even in former times, there was another field in which the profession of the law found what I believe to be the best and widest opportunities for redeeming itself from exclusiveness. It is a field which is less attractive than that of letters to many of us; but it is one on which the law wastes none of her frowns, for it adjoins—or perhaps I should say it surrounds and comprehends—her own domain. That field is the field of public life. There are few among the great men of the profession whose names are household words to us, and who have made the law and practice of Scotland what it is, who have not graduated in the unrivalled school of experience which it offers. If regard be had to the social and political conditions which prevailed in Scotland before the union of the parliaments, it is easy to see how natural it was that the leaders of the profession should have been found among those who were immersed in public affairs. But this close connection between

the profession and public life was in no way severed—it was hardly weakened—by the removal of the centre of the public business of the nation to London. That connection is one of the traditions of the profession. It bulks largely in the history of the bar of Scotland in particular, and as it plays what seems to me a vitally important part in determining alike the position and the qualities of those who become leaders of the profession, it calls for some observation in this address. It is obvious, of course, that the more engrossing forms of public life are not for everybody; and, generally speaking, at any rate, it is unwise and detrimental to undertake them until the attainment of thorough professional competency has been reached and the foundations of a good practice have been well and truly laid. There are also, perhaps, some among those who join our ranks who have little or nothing to learn from public life; but these are few. I have heard it whispered that there is an inclination in these days to look askance on public life, and to regard it as a school in which the undesirable attributes of some of the pupils outweigh the advantages of the training it offers. If such an inclination is abroad, I wish to say that the profession will, in my judgment, fail in duty to itself—to appeal to no higher ground—if it does not denounce and overcome it. No attitude could be more baneful to it than that of gathering up its gown of silk or stuff lest it should be defiled by contact with common things and ordinary people. There is always, of course, a considerable school whose interest in public affairs is shown in little else than the free bestowal of aspersions upon the mixed motives of those who conduct them. But there is no room for snobberies and priggeries of this—or any other—kind in the profession of the law. It is to the public at large that its obligations are due; and it must ever regard public service not as degradation and defilement but as pride and honour. Besides, *jus dicere* is itself one of the functions of government, one of the departments of public affairs, and no more illuminative means of information and understanding can be put within the reach of the professional lawyer than to place him in a position—away from chambers, offices, and Courts—where he sees the law from a standpoint the opposite of his own—the standpoint not of the man who administers it, but of the public the manner of whose lives it either interprets and supports, or controls and regulates. Let him learn for himself how the law, which it is his professional business to administer, grinds out its slow results in the daily lives of those it governs, and in the daily operations of the machinery of Parliament and the Departments. Whatever

results such experience may produce, it cannot fail to bring the broad horizons into view. This is why I should regard with dismay any tendency to depart from the tradition of the profession in this matter of participation in public life or to slacken in the observance of it. There is, no doubt, much in public life which makes it to many of us unattractive; and I am not suggesting that it is for everybody to hazard it. It offers a stern discipline, even if natural endowments bring some share of success in it. What may be described as the changes of climate involved in frequent alternation between the wide but troubled atmosphere of public life and the quiet concentration of professional practice is severe on anybody, and almost intolerable by some. Moreover, there is a heavy price to pay: I know as well as most how heavy. It is all that Cockburn says that Jeffrey found it, and more; and often has the "lawyer politician" murmured to himself, by way of reviving a fainting courage—*forsan et hæc olim meminisse juvabit.* But learners in other hard schools have done the same; and learners in this school, as in the others, live to treasure memories of school-time from which the stains of hardship fade. But, whatever we may think of these things, they are certainly not reasons for declining the struggle: and the history of the profession, and the lives and experience of its leaders, are a convincing demonstration that to take a man's part in public affairs is not only the high path of duty to the profession, but is well worth the pains. The conditions of public life in this country impose the necessity of taking a side, and the mind that sees no lessons in public life, except such as party strife affords, will gain less than nothing by going beyond the routine of professional practice. The value of the experience such a mind will gather will be like that which the recently displayed ingenuity of one of the ablest of Parliamentary draftsmen has acquainted us with in another sphere—a *minus* value. But to a man with even ordinary insight the rough and tumble of public affairs has in it a bracing inspiration which throws its inconveniences into the shade. There is no experience more broadening, more moderating, than active participation in that clash of half-conscious forces—whether at the hustings or in the House of Commons—from whose apparently rude contact emanate the impulses which determine the course of the ship of State in her never-ending adventure in search of political and social justice. The circumstances of the moment may make a judicious entry into the arena of public life more difficult and more perplexing than usual. But these will pass; or, if they do not, the native character of my young countryman will know how to surmount them. The great past of the profession of the

law will not outshine its future, if it continues mindful of its traditions and resolute to uphold them, to be eager as of old to carry the working of its interdependent organisation to the highest pitch of attainable efficiency, and to deserve by its character and ability the respect of the community it serves.

NOTES ON THE RENT RESTRICTION ACTS.

Form of Notice of Increase of Rent.

Sec. 3 provides—(1) "Nothing in this Act shall be taken to "authorise any increase of rent in respect of a period during "which but for this Act the landlord would be entitled to "obtain possession . . . (2) Notwithstanding any agree- "ment to the contrary, where the rent of any dwelling-house "to which this Act applies is increased, no such increase shall "be due or recoverable until or in respect of any period "prior to the expiry of four clear weeks, or, where such "increase is on account of an increase in rates, one clear week, "after the landlord has served upon the tenant a valid notice "in writing of his intention to increase the rent, which notice "shall be in the form contained in the First Schedule to this "Act, or in a form substantially to the same effect." The First Schedule to the Act states that "the increase under head "(*b*) will date from , being one clear week "from the date of this notice, and the remaining increases "from , being four clear weeks from the date "of this notice."

In July, 1920, a landlord gave notice to quit to the occupant of a dwelling-house. This was followed by a notice of increase of rent under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The notice to quit was invalid, and a subsequent valid notice to quit was served on the tenant in December, 1920. No further notice of increase of rent was, however, served on him. An action was brought by the landlord against the tenant for rent. It was held (*Peizer* v. *Federman*, 66 S.J. 108) that the notice of increase of rent served on the tenant in July, 1920, was invalid (1) as it was not accompanied by or preceded by a valid notice to quit, and (2) as the dates specified in it were not correct—the dates constituting a substantial part of the form of the notice required by the statute.

The remarks of Horridge, J., as to form of notice may be quoted—"The notice of increase of rent must specify a date "from which the landlord was entitled to the increased rent. "The correct dates had not been specified in the July notice

"of increase, as no rent was recoverable until after the expira-
"tion of the valid notice to quit was given in December.
"The dates were wrong, and as they were an essential part
"of the notice, the notice in question was neither in the statu-
"tory form nor in a form substantially to the same effect, and
"was consequently invalid."

Notice to Quit before Increasing Rent.

Conditions precedent to the exercise of rights are not to be implied unnecessarily. In *Shuter* v. *Herch*, 38 T.L.R. 137, it was held that once a statutory tenancy has been created by the service of a notice to quit, followed by "holding over" on the part of the tenant, it is not necessary for the landlord to serve any further notices to quit before making the subsequent increase of rent which the Increase of Rent, &c., Act, 1920, permits. In other words, the Court once more affirmed the principle of *Davies* v. *Bristow* and *Penrhos College, Limited* v. *Buttler*, 1920, 3 K.B. 428, and disapproved of the contrary rule suggested in *Hartell* v. *Blackler*, 1920, 2 K.B. 161.

Reconstructed Premises—Standard Rent.

The Court of Appeal, in *Phillips* v. *Barnett*, 66 S.J. 12, gave the important ruling that, where a landlord reconstructed and converted three adjoining houses, which were within the protection of the Increase of Rent, &c., Restrictions Act, 1915, into a factory, and in 1920 let the factory for the first time as such, the standard rent of the factory, for the purposes of the Increase of Rent and Mortgage Interest Act, 1920, is the rent at which it was first let in 1920. Such factory is a new building, and the aggregate standard rent of the three dwelling-houses does not apply to it. The facts of the case were indeed extraordinary—the three houses referred to were each under £30 rental. The owner obtained vacant possession in 1918, and converted them into a factory. So great was the alteration, and so excellent a factory was it when completed, that the plaintiff and his wife were prepared to enter into a lease to take these premises for twenty-one years at £700 a year, and, having done that, it occurred to them that they, having agreed to take these premises for twenty-one years at £700 a year, the effect of the Increase of Rent, &c. (Restrictions) Act, 1920, was that they need not pay more than the standard rent of the three separate dwelling-houses, and that, having paid the first year in advance, they were entitled to recover back the difference between the amount they paid and the amount of the standard rent, and they brought an action for that purpose.

Lord Justice Scrutton, in his usual terse style, thus states the ground of judgment—" The landlord has reconstructed the " premises, and has made a complete change in them. Instead " of being three dwelling-houses, they are one factory. The " restriction on the dwelling-houses remained so long as they " were dwelling-houses, and when the premises became " entirely a factory, up to the passing of the Act of 1920, " there were no restrictions. When the Act of 1920 was " passed, all business premises were brought within the Act. " In the case of business premises which were for the first " time let after the 3rd day of August, 1914, the standard rent " is the rent at which it was first let, namely, £700. It " appears to be quite a mistake to endeavour to apply the " restrictions applicable to the rent of dwelling-houses to a " thing which was not a dwelling-house at all, but was used " as and only adapted as a factory. Mr. Mathews raised " some argument upon sub-sec. 6 of sec. 12 of the Act of 1920, " ' Where this Act has become applicable to any dwelling- " ' house . . . it shall continue to apply thereto whether " ' or not the dwelling-house continues to be one to which this " ' Act applies.' It appears to me that throughout that sub- " section there runs the condition that there shall be a dwel- " ling-house—' shall continue to apply thereto '—*i.e.*, to the " dwelling-house, ' whether or not the dwelling-house con- " ' tinues to be a dwelling-house.' There are dwelling-houses " to which the Act does not apply. But sec. 6 does not mean " that once a dwelling-house, anything on that land shall " always be subject to the restrictions, whether it is a dwelling- " house or not, or that the land shall be subject to those " restrictions whether there is a dwelling-house on it or not."

Standard Rent—Determination—Jurisdiction.

A dispute arose between landlords and their tenants as to the standard rent of certain premises, and an application (*Broomhall* v. *Property Agents and Owners, Limited*, 66 S.J. 125) was made to the county judge for the determination of that sole question. The County Court judge, believing that he had jurisdiction to decide the question under sec. 2, sub-sec. (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, decided that the standard rent was the rent which was paid by the tenant on 3rd August, 1914. The defendant company appealed to the Divisional Court, and it was contended on behalf of the appellants that the County Court judge had no jurisdiction to decide what was the standard rent of the premises. Sec. 2 of the Act of 1920 provided, sub-sec. (1)—" The " amount by which the increased rent of a dwelling-house to

"which this Act applies may exceed the standard rent shall, "subject to the provisions of this Act, be as follows, that is "to say (*a*) . . . Provided that the tenant may apply "to the County Court for an order suspending or reducing "such increase on the ground that such expenditure is or was "necessary in whole or in part, and the Court may make an "order accordingly . . ." Sub-sec. (6)—"Any question "arising under sub-secs. (1), (2), or (3) of this section shall "be determined on the application either of the landlord or "the tenant by the County Court, and the decision of the "Court shall be final and conclusive." Standard rent is defined in sec. 12. On appeal, however, the Divisional Court held that the County Court judge had no general jurisdiction to decide this question when it was the sole question submitted for his decision. In view of sec. 2 of the Act of 1920, the County Court judge would have jurisdiction to decide any question as to whether the increase of rent was right or wrong. It was true that in doing so he might have to take the standard rent into consideration, and the Act might have given him jurisdiction to decide generally what the standard rent was, but the Act had not done so. It only gave him jurisdiction to say whether an increase was right, having regard to the standard rent. He had therefore no jurisdiction to fix the standard rent in this case.

The decision is worth noting. Would an action of declarator in our Courts to find and declare that the standard rent was such and such be deemed incompetent? We venture the opinion that it might, on the ground that it would be bringing for decision an abstract question which could more effectively be tried by increasing the rent in the statutory way and then suing for payment.

THE PLEADER.

The judgment of the First Division in *Caledonian Railway Company and G. & S.-W. Railway Company* v. *Corporation of Greenock*, 1922, 1 S.L.T. 25, is one of those leading decisions which occur at intervals reviewing the subject of taxation of Court of Session expenses. The principles which it emphasises are (1) when the proofs in two cases are taken together—not conjoined—that by itself is no sufficient justification for any discrimination between the scale of fees allowed to (in this case, for instance) the two pursuers; (2) the standard of fees to be sent to counsel varies according to the practice for the time of agents instructing counsel, which practice may vary according to the nature of the case in hand; (3) "counsel" means

competent counsel; the employment of special counsel at special fees "ought not to be allowed to throw an extra burden on the unsuccessful party, however valuable the services of such counsel may be to their own clients"; (4) the custom of allowing for jury trials what were termed "maximum fees and of "refusing fees of like amount for proofs, unless in exceptional "circumstances," may well have become attenuated under changed conditions of practice; and (5) the practice hitherto in strict vogue that experts should not be allowed anything, as between party and party, for consultation with counsel as to the line of expert evidence or as to the material of such evidence may be modified in cases of magnitude.

In regard to this last point the Lord President observed—"The allowance is made to an expert only *qua* witness. This "excludes all charges for assistance given to counsel in Court "both during the proof and at the hearing, whether in the "Outer House or in the Inner House. Assistance of this kind "in cases which involve technical question can be most useful "not to counsel only, but through them to the Court, and it "may be that if the Table of Fees became subject to revision, "the inclusion of some provision for an allowance in respect "of such assistance should be considered. Again, investiga-"tions made during the proof but after the expert witness has "left the box may afford invaluable guidance in the examina-"tion of other witnesses or in the cross-examination of experts "adduced by the opposite party. But such investigations are "not recognised as affording permissible ground for an allow-"ance under the Table of Fees."

The general working rule suggested by Lord President Inglis in *Young* v. *Glasgow Tramway Company*, 10 R. 242, by which a jury's verdict of damages ought not to be interfered with unless it appears to be at least twice as large as can be regarded as a reasonable award has not been affected by the opinion of Lord President Clyde in *Elliot* v. *Glasgow Corporation*, 1922, 1 S.L.T. 55, but his lordship's opinion, inasmuch as it contains important observations as to the amount of damages where there is no pecuniary loss, but a claim solely for solatium, will be found to be a useful practical authority on this branch of law. His concluding words were -"Stating "the matter very generally, I think the usual award for "solatium only—both according to the verdicts of juries and "according to the course of decisions in which verdicts have "been upset as excessive—runs in the neighbourhood of one or "two hundred pounds, according to the circumstances, whatever "be the age or the position in life of the victim of the "accident."

The well-known rule that when a person has been charged criminally he cannot be questioned by the police without being duly cautioned that he is not bound to answer, and that anything he says may be used in evidence against him, may not in theory be affected by the decision in *Costello* v. *Macpherson*, 1922, 1 S.L.T. 37, but in practice that decision may have results which will be found to be inconsistent, with the wholesome rule referred to. It was there held that it is competent to receive police evidence of what an accused voluntarily stated without any question being addressed to him.

We referred last month to the question of contributory negligence. We notice a disquisition on this subject by Lord Haldane in the Dundee harbour cases, lately decided in the House of Lords, but not yet reported. According to his wont, that eminent judge makes several very wide generalisations, and from reading these in the newspapers we respectfully think they are likely to be of material assistance in assisting the solution of damages cases where a defence of contributory negligence is stated. We shall return to them after having perused the official reports of the cases.

We hope Lord Sands' opinion in *A.* v. *C.*, 1922, 1 S.L.T. 35, will be adopted into general practice. He was dealing with a motion to delete irrelevant averments from the record. He held the averments irrelevant, and refused proof as to same, but declined to order deletion. He states various reasons for this course, and for these we refer readers to the report of the case.

Obituary.

At Glasgow, on 7th January, Mr. Thomas Stark, senior partner of Messrs. Thomas Stark & Co. Mr. Stark was well known in legal circles, having been in practice in Glasgow for almost half a century. Part of his early training was acquired with the firm of Messrs. A. J. & A. Graham, Glasgow. He had been in failing health for the last three years, and leaves a widow and grown-up family.

At Glasgow, on 9th January, Mr. Henry James Black, a partner in the firm of Messrs. Nicolson, MacWilliam & Co., solicitors. Mr. Black was fifty-eight years of age.

At Edinburgh on 20th January, Mr. J. Campbell Lorimer, K.C., late Sheriff-Principal of Aberdeen, Kincardine, and Banff. Mr. Lorimer was born in 1841, and educated at the Glasgow Academy and the Universities of Glasgow and Edinburgh. He served his apprenticeship with Messrs. Bannatyne & Kirkwood, Glasgow, and was called to the bar in 1866. From 1882 to 1886 he was standing counsel to the Inland Revenue, and in

the latter year he was appointed an advocate-depute. In 1892 he received a similar appointment, and continued in that office till 1895. Five years later, on the passing of the Private Legislation (Scotland) Procedure Act, he was appointed senior counsel to the Secretary for Scotland, and in 1903 he became a King's Counsel. In 1908 he was appointed Sheriff-Principal of Ayr, an office which he occupied until 1911, when he was appointed Sheriff-Principal of Aberdeen, Kincardine, and Banff.

At Glasgow, on 21st January, Mr. J. A. Thom, of Messrs. Thom & Hendrick, aged sixty-eight years. Mr. Thom was educated at the Glasgow High School and University. He was admitted a member of the Faculty of Procurators in 1893, and served on various committees.

At Glasgow, on 22nd January, Mr. John M'Intyre, of Messrs. Laird & M'Intyre, aged sixty-eight. Mr. M'Intyre was educated in the Oban Grammar School, and left for Glasgow at the age of fourteen, where he entered on an apprenticeship in law with the late Mr. J. Fisher M'Laren. On the completion of his apprenticeship he entered the University of Glasgow. After a distinguished career he received an appointment in the office of Messrs. Stevenson & Fyfe, and ultimately in that of Messrs. James Ritchie M'Lean & Co., of which he became a partner, the firm at the time of his death being Messrs. Laird & M'Intyre. He is survived by his widow and a son.

At Edinburgh, on 26th January, Mr. William Spink, S.S.C., in his eighty-fourth year. Mr. Spink was admitted a member of the Society of Solicitors before the Supreme Courts in 1865. He retired from practice some years ago.

At Paisley, on 28th January, Mr. William Walker, senior partner of Messrs. T. & W. Walker, aged sixty-nine. Mr. Walker studied at Edinburgh University. In 1882 he was appointed procurator-fiscal for Paisley in succession to the late Mr. George Hart. For over twenty years he was clerk to the Faculty of Procurators in Paisley. He is survived by three sons.

Notes from Edinburgh.

Parliament House, 31*st January*, 1922.

January has been a remarkable month here, because of the unusual amount of disturbance of business experienced owing to the absence through illness of several judges. The epidemic of influenza has made itself seriously felt in Edinburgh, and it might be thought that the Court of Session had been receiving its fair share of the trouble, but, happily, in no case could illness be blamed on the prevailing epidemic. Colds and chills led to the absence at different times of the Lord Justice-Clerk, Lord

Salvesen and Lord Anderson, and owing to the fact that the Valuation Appeal Court was having protracted sittings, the scarcity of judges for ordinary business led to the Second Division having no sederunt for eight days out of a fortnight. Lord Salvesen who had sat right through the proceedings of the Valuation Appeal Court was, through indisposition, unable to help make up a quorum on the recovery of the Lord Justice-Clerk, and it was only possible for the Second Division to have two days' sittings out of the fortnight by Lord Ashmore lending his aid. As Lord Dundas is still on sick leave, the Second Division during the greater part of that fortnight could only muster one judge, Lord Ormidale, who occupied his time by officiating in the Outer House for Lord Anderson and Lord Hunter while the former was absent and the latter was detained in the Valuation Appeal Court. As the Court will rise for the February adjournment on 4th February, resuming on Tuesday, 14th, the record of work transacted by the Second Division between the beginning of the year and 20th March will not be a great one.

On 17th January an article appeared in the *Glasgow Herald*, written by a legal correspondent, dealing mainly with the position of the judges of the Inner House who, as was pointed out, come up automatically from the Outer House to the appellate bench according to seniority, and the contention was put forward that appointments made to the appellate bench should not necessarily be gone about by moving the senior Lord Ordinary up, but rather that lawyers of eminence should be chosen and placed on the higher bench right away. The judicial qualifications of the more important sheriffs, it was suggested, should in this matter receive recognition; and the desirability of eliminating politics entirely from all judicial appointments was strongly dwelt upon. It is in theory an excellent idea that of having an appellate bench manned by the very best legal talent available, and if it could be arranged that the emoluments of the Inner House judges could be increased so as to raise their status to a higher level than that of the Outer House judges, perhaps there might be some attraction offered greater than that presented by the post of Junior Lord Ordinary, for that is the post that any newcomer must take, except, of course, in the case of a Lord President or Lord Justice-Clerk, both of whom usually come in from the outside. To have to start at the bottom of the ladder as Junior Lord Ordinary does not always seem to appeal to pleaders of great distinction, and as the emoluments of that junior judge are exactly the same as those of each of the Inner House judges, other than the Lord

President and Lord Justice-Clerk, it will be apparent that so long as a flat rate for all senators exists, the appellate bench is not any more likely to attract a lawyer of outstanding eminence than does the position of Junior Lord Ordinary. The principle on which a judge is appointed is that he is presumed to be of calibre equal to those whom he joins as member of a fraternity. He undergoes his trials (such as they are) and takes the vacant chair at the bottom of the table, taking the chance of a long or short spell of the junior's work; and, according to experience of recent years, he is not long in being moved upwards even into the Inner House, according to the arrangements made by the Act 53 George III., ch. 64, section 14, which provides the system of elevation now observed. The system may have its weak points, yet it provides for an adequate judicial experience being acquired in the Outer House before the appellate bench is reached. Any system which sought to make distinctions between one class of judge and another in the Supreme Court would mean that a reconstruction of the College of Justice would be necessary. At the present time it often happens that an Outer House judge (it may be the Junior Lord Ordinary) has to be requisitioned to make up a quorum in one of the two Divisions of the Inner House. That is part of the existing system, and his opinion is regarded as being of no less weight than it would be were he to be giving his opinion in a case laid before the whole Court. As for sheriffs being eligible for elevation right away to the appellate bench, the idea is not unworthy of consideration, if it should happen that sheriffs of outstanding merit are available. Within comparatively recent years, Perthshire, Fife, and Ross and Cromarty provided Court of Session judges who were content to come through the mill, starting as Junior Lords Ordinary, yet all were of sufficient distinction to have gone right away to the appellate bench if any selection had been possible from among the sheriffs.

The *Herald* article made mention of the passing over of Mr. Alexander Asher. A pleader of his great eminence would not have been asked to start as Junior Lord Ordinary, and there was no chair to offer him had such an offer been contemplated. To have appointed him directly to the appellate bench would not have been possible according to the constitution of the Court of Session, and even had it been possible, the emoluments, being no better than those of the Junior Lord Ordinary, would not have been attractive. He was on the wrong side of politics, and in his case the pernicious system of political preferment was exemplified. It can be pointed to as a strong argument for the exclusion of politics from all judicial appointments, though how

such a thing can be managed it is not easy to say. It is desirable that tradition in this matter should be broken, but it will not be broken so long as the political arena offers such strong attractions as it does to lawyers.

The people of Aberdeenshire are canny folks and have a reputation for being shrewd, hard-headed customers where their financial interests are concerned. It seems inexplicable, therefore, how any of them allowed the enterprising English adventurer posing as a Colonel to carry out his numerous frauds on them in the way he did, the more inexplicable as, to the critical, educated Edinburgh eye the adventurer in the dock did not seem to present the aspect of one at all likely to fill the bill as fabricated by himself, but, then, it is not every man who can present a favourable appearance in the criminal dock. Daring and impudent though his fraudulent scheme was, nevertheless there was some commercial soundness about it, and if the sporting guests had waxed manifold, the venture might have led to landlords' and creditors' claims being met in full, in which case the false representations made might have been forgiven him in return for hard cash. Impudence and falsehood without cash backing constitute but flimsy capital wherewith to embark on a scheme like that engaged in, and on its failure the bogus Colonel with one previous conviction for fraud against him was not too severely punished by the sentence of five years' penal servitude passed on him by the Lord Justice General. It has been instructive to read some of the English newspaper reports of the prosecution, for the ideas harboured in England as to what a "Laird" is in Scotland seem to be very loose. A bogus "Colonel" the prisoner certainly was, but a bogus "Laird" he neither was nor could be, for he occupied Drumblair merely as tenant.

The Justiciary Appeal Court had recently a curious point of procedure to determine, viz , whether a verdict by fourteen jurors can be taken of consent, one member of the fifteen empanelled and sworn having had to retire through illness in the course of a Sheriff Court criminal trial. There could not have been much, if any, doubt entertained as to what the decision of the Appeal Court would be, looking to the rigid standard of correctness in criminal procedure which is insisted on by the judges of the High Court. The conviction following on the verdict given by the jury of fourteen was quashed, and the two persons who had been convicted of theft and reset were liberated, the judgment of the Appeal Court saying nothing as to the theoretical point raised as to whether or not the accused had tholed an assize, such a point being outside the scope of the appeal. The illness of a juryman is no new thing, and it would

seem to be correct procedure in such a case for the prosecutor to ask leave to abandon further proceedings on the particular indictment, leaving it open for a new indictment to be served. A complete jury of fifteen makes it possible for a verdict by a majority to be returned, but with fourteen an equal division would be possible, and an impasse would result. In civil trials the illness of a juror causes little trouble, for the parties being untrammelled by the rigid rules applicable to criminal procedure, can agree by joint minute to proceed with eleven or even a less number of jurors.

Following on the Justiciary Appeal Court's decision, the Depute-Fiscal in Glasgow seems to have harboured some idea of providing against the contingency of a juror being taken ill in future cases, for he moved the Sheriff-Substitute, after a jury of fifteen had been duly empanelled to try a case, to bid those not balloted to remain in Court in case one might be required to fill up a gap caused by illness. A gap could of course be filled up at a very early stage of a trial of consent of the accused, though this would mean a re-swearing of the jury and a re-calling of witnesses. It would not necessarily happen, however, that an accused would give consent to any such course; he might rather risk the chance of a second indictment, and without his consent the depleted jury would have to be discharged and the proceedings abandoned. A simple expedient might be here suggested to provide against trouble caused by the sickness of juror or jurors, which might be a serious matter in the course of a protracted criminal trial. An Act of Parliament would be necessary to amend the Jurors (Scotland) Act, 1825, and what is here suggested is that in addition to each jury of fifteen balloted an additional three should be included in the ballot and sworn along with the fifteen, those three extra jurors being kept in Court, and secluded, if necessary, until the end of the trial in case the services of one or more of them should be required. They would be there in Court following the whole proceedings, but would take no part in the jury's deliberations except when one or more happened to be required to fill a gap or gaps caused by illness in the main body.

Since he resigned the office of Sheriff of Aberdeen, Kincardine and Banff some two years ago, the late Mr. J. Campbell Lorimer, K.C., had been steadily declining in health, and yet in spite of bodily weakness and suffering his mind kept active and he continued to take a keen interest in all matters pertaining to the world of law. At the time he was appointed Sheriff, in 1911, he was well advanced in years, but his vitality and activity were remarkable, pedestrianism and cycling being his diversions. He

was the last survivor of the counsel appearing for the Crown in the great Monson trial of 1893, the group being composed of Solicitor-General Asher and Advocates-Depute R. U. Strachan, J. A. Reid, J. C. Lorimer and John Baxter. Of the defending counsel only Lord Ashmore remains, Sheriff Comrie Thomson and William Findlay having been respectively senior and junior to his lordship, who was then Mr. John Wilson practising as a junior counsel.

During January there were 22 new causes received in the Inner House, the First Division having 15 and the Second Division having 7. The 15 in the First Division are made up of 6 reclaiming notes, 4 appeals, 2 special cases, 1 remitted cause for jury trial, 1 Exchequer appeal, and 1 stated case under the Workmen's Compensation Act. The 7 in the other Division consist of 3 reclaiming notes, 2 appeals, 1 special case, and 1 remitted cause for jury trial.

In the Outer House during the month there were called 124 new summonses, and of these only 37 are divorces, there being also 1 declarator of marriage. Lord Anderson heads the list with 38, of which 15 are divorces, and there is also the 1 declarator of marriage among them. Lord Sands comes next with 34, of which 14 are divorces; Lord Ashmore has 26, of which 5 are divorces; Lord Hunter has 15, with no divorces; and Lord Blackburn has 11, with 3 divorces among them.

The new table of dues exigible in the Register of Sasines and kindred Registers is now in operation, and the substantial increases imposed are being regarded with feelings of great dissatisfaction by legal practitioners. The new table of dues will be found printed in this issue of the Review.

Notes from London.

THE TEMPLE, 31*st January*, 1922.

THE sittings of the Courts, after the Christmas vacation, began with a cause list which showed a very considerable diminution compared with the figures of a year ago. But this diminution arises from the fact that the Divorce Court is now free from arrears, owing to the special efforts made by the Lord Chancellor, Lord Mersey, and the several King's Bench Division judges who left their own proper work last summer to do that of the Divorce Division. The number of cases in the divorce list is still, however, double of what it was in the pre-war period, and this raises the question whether the ordinary judges of the Divorce Division can cope with that sort of increase, if it has become

permanent, for the future. It is not to be dreamed of, and yet the services of the Lord Chancellor, and Lord Mersey, and the King's Bench judges can no longer be relied on. In the King's Bench Division there are great arrears, and the cases are nearly twice as numerous as they used to be before the war. When the present sittings began in Hilary Term, as it is called, there was a great array of judges on the bench to begin the business of getting through the cases, but they had hardly begun before half of the King's Bench Division judges were starting from London to go on circuit. By this time there ought to have been in operation the Administration of Justice Act, 1920, which was intended to enable divorce cases to be heard at the Assizes by Commissioners, but up to the present nothing has been done to bring this Act into a working shape, and putting it to do what it was intended to do. The judges themselves on circuit would have the power to try divorce cases as if they were judges of the Divorce Division, and so far this would throw more work on them at Assizes than they have now to do. This excuse has been put forward by the Attorney-General as a reason for not having done what was necessary to bring the Administration of Justice Act into operation. He says that while the pressure of work in the King's Bench Division remains as heavy as it is, it is not practicable to increase the amount of work to be done by the King's Bench judges at Assizes. This is but a poor excuse because, if the judges are not numerous enough to do the work of the King's Bench, and are thus prevented from taking a hand in such a public duty as that of enabling matrimonial cases to be tried locally without the heavy expense of proceedings in London, then clearly what ought to be done is either to appoint more High Court judges, or to give the County Courts jurisdiction to do divorce business. But neither of these expedients seems to be in favour with the powers at the head of the legal administration, the Lord Chancellor, the Lord Chief Justice, and the President of the Divorce Division; and, therefore, they have taken no steps to bring the Administration of Justice Act into the practice of the Assizes Court or of the County Courts. Meanwhile, whether the influence of the bench and bar in London, which have now the monopoly of divorce work in the High Court, has anything to do with the delay or not, they at all events would be well satisfied to leave matters as they are. It would cause much perturbation amongst them if their monopoly was disturbed, and they probably urge against change, that the excess of divorce cases is only a passing phase, and that it will disappear in the near future. They have something to go on in the fact that the divorce flood has subsided rapidly of late.

There has been talk of a proposal for an increase of the salary of the judges being brought before Parliament. The Lord Chancellor gave a hint of this some time ago, but nothing has yet been done. A judge of an earlier date is said to have exclaimed to a friend who had just been appointed to a minor judicial position, "Depend upon it, it is a damned fine thing "anyhow to sit on a bench." The judges of the High Court will no doubt comfort themselves with this reflection in musing upon the mood in which Parliament would receive any proposition that the salaries of the judges should be increased. The Attorney-General and Mr. Shortt, the Home Secretary, are said both to be tiring of political life, and would only be too glad, in the changes of politics which seem to be imminent, if they should find themselves safely stowed in the ark of judicial office. It may have been as part of the electioneering gossip lately so prevalent that these renewed rumours about the Attorney-General and Mr. Shortt have come into currency once more. Perhaps they will die out now it appears to have been decided that there is not to be an immediate or early election. They will not be interested meanwhile in the question of judicial salaries. One may speculate, however, whether the new order making a very extensive and steep increase of the Supreme Court fees to be payable in most branches of litigation has anything to do with the increase of judicial salaries. It may be a preliminary measure, designed to meet such expenses as the raising of the judges' salaries, in economic circumstances where an "anti-waste" government would hardly dare incur the reproach of increasing these salaries out of public money. So the litigants must pay more, and make up for the decreased value of the judicial salaries, if it has become necessary to do so, especially as the increased salaries of other officials have grown in one year from £223,000 to £350,000. The new burden on litigants may, however, check litigation to some extent, and money might be saved, say, on one additional judge. The new order has nothing to do with counsel's fees, but if suitors have to pay more the one way they will pay less in another, and so counsel's fees may indirectly suffer, and savings may be effected by cutting down the expenses on briefs. One may notice that in a sense the extra burden of fees payable by litigants is a step backward from the ideal that the State should bear all the costs of the administration of justice. But this is only the loss of one ideal amongst many that these late years have cost us.

The question of the grand jury system has been very much debated since the Act, passed during the war, approached the fixed time after the end of the war when it will expire and the

grand jury return. I know you are not familiar with the grand jury in Scotland as we are in England, although you have the same machinery in trials for treason. At all criminal trials at Quarter Sessions or Assizes there must be a grand jury sworn of persons of a superior pecuniary and social position, and it is doubtless to a large extent now an unnecessarily cumbrous wheel in the legal machinery. An extraordinary diversity of opinion has been expressed about it by lawyers who occupy judicial positions as recorders or chairmen of Quarter Sessions, and laymen who also act as chairmen of Quarter Sessions, as well as by grand juries themselves. Generally speaking, most of the legal persons taking part in the criticism are against reviving the system, though there are a goodly number who hold that there is so much good in it that it is worth preserving. Lord Justice Bankes in addressing a grand jury at Quarter Sessions, of which he was chairman, condemned the system at Quarter Sessions, but thought it ought to be retained at Assizes where the offences triable are of a more serious character than at Quarter Sessions. One of the judges of the High Court, in a letter to *The Times* has also expressed that view. At one Quarter Sessions, where the lay chairman warmly defended the grand jury as useful to the administration of justice, it appeared that altogether sixty-two persons were summoned on the grand and common jury from different parts of the county, and the only prisoners were two boys charged with stealing chocolates from shop windows, and they pleaded guilty. The grand jury is supposed by its advocates to be a safeguard of innocence by an investigation which is taken out of the hands of legal persons and entrusted to laymen. It was a valued privilege one time by the lay public that they should be protected and saved from public trial by the grand jury. But things have altered. To say nothing of the less arbitrary nature of the executive in political offences, there are formal preliminary enquiries before high-class magistrates, which used not to exist in the bad old days when "trading" justices sat at Bow Street. And besides, many safeguards now exist which formerly did not exist at criminal trials, and there is besides that beneficent institution, the Court of Criminal Appeal. On the whole it seems probable that the middle course will be adopted, and the grand jury only retained at Assizes or at Courts like the Central Criminal Court, when the Grand Juries (Suspension) Act, 1917, expires in February, six months after the termination of war fixed by the Order in Council.

The grand jury may disappear with the "grand" Lord Chancellor if Lord Birkenhead's example is followed. The type

of old dignified Lord Chancellor may be taken to be Lord Cairns and Lord Selborne, with Lord Haldane and Lord Finlay as their most modern type. Nothing can be further away from their style than that of Lord Birkenhead. A little before Christmas Lord Birkenhead was a guest on a Sunday evening at the Old Playgoers Club, and had to submit to some "chaff" of a kind which was not in good taste, and which he resented. In Lord Cairn's and Lord Selborne's days the Lord Chancellor would have been barred by a rigid etiquette from attending such a function.

Lord Birkenhead has done something still more unusual in being a conspicuous spectator of the "boxing match" between Carpentier the French and Cook the Australian. The older members of the profession look askance at such breaks away from tradition, but at any rate the Lord Chancellor can plead a gravity which befits grave occasions, and he bears himself in them with an ability not surpassed by his more formal predecessors. Of his recent judgment in the House of Lords in the case of the steamship *Volute,* Lord Finlay and Lord Shaw both said that they regarded Lord Birkenhead's judgment as a great and permanent contribution to the law. The same may be said also of his judgment in *Gaskill* v. *Gaskill* in July last, a divorce case which turned on the point of the period of gestation. Lord Birkenhead indeed moves from "grave to gay, from lively to severe" with equal facility, and with the same mastery in either mood.

That very distinguished Lanarkshire native, Viscount Bryce, jurist, historian, diplomatist, and statesman, passed from this scene of so many of his labours and various honours at the age of eighty-four. It would require much space to describe the activities of his life in many departments of literature, and the offices he held in the political world; and it is hardly necessary to go into details for the readers of this REVIEW. Every reader knows him as Regius Professor of Civil Law at Oxford; more intimately still as the constitutional historian of the United States, and author of that earlier and equally famous book by which he attained European celebrity, "The Holy Roman "Empire." My own earlier acquaintance with him in any capacity was when he was one of the professors at the Inns of Court. At that time the educational arrangements of the Inns of Court were somewhat crude in comparison with those now existing; though their professors were of especial eminence: to mention only those I heard—Maine, Pollock, Frederic Harrison, and Bryce. My memory of Bryce does not take me back to the days of his ordinary practice of a Chancery barrister at the

English bar, nor to his earliest work as I find it mentioned in a reference book, so curiously unlike the generality of his writings, "The Flora of the Island of Arran," published in 1859. It strikes me as so incongruous, however, that I am inclined to think there is a confusion here with Byrce's father, one of the masters of the Glasgow High School and geologist who wrote about Arran.

The death of Bryce was sudden; that is to say, judging from his recent activities, one might have expected him wearing out a longer life, one comparable to his fellow Chancery barrister, and of attainments similar in so many things, Frederic Harrison, who has reached the age of ninety, or perhaps even attaining Lord Halsbury's age of ninety-six. Lord Bryce and Frederic Harrison were both mountain climbers, and their physique was of the lean and bony type on which centenarians are mostly built. Lord Halsbury in type was the opposite of this, and yet he approached nearer to his century than his distinguished contemporary and political opponent Bryce, who seemed more likely to add that distinction, whatever may be its worth, to his other achievements.

NOTES OF ENGLISH CASES.

The following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

17. Taxation of costs—allowance to sea-going witness. The mate of a fishing trawler held entitled to £280 for detention on shore to give evidence. *The Ibis VI.* P.D. 28th October. 38 T.R. 55.

18. Increase of Rent, &c. (Restrictions), Act, 1920, sec. 3 (1) (2), first schedule. A notice to increase rent must state correctly the dates from which the increases are payable, and must be preceded or accompanied by a valid notice to quit. *Peizer* v. *Fedderman*, K.B.D. 27th October. 38 T.R. 54.

19. Collision—action by salvors for damage to wreck. Salvors are entitled to damages done to the wreck by a collision while they are in possession of it. *The Zelo*, P.D. 4th November. 38 T.R. 69.

Appointments, Business Changes, &c.

King's Remembrancer.—Sir James Adam, C.B.E., K.C., has been appointed King's and Lord Treasurer's Remembrancer in Scotland in the place of Sir Kenneth Mackenzie, Bart., resigned.

Society of Procurators of Midlothian.—Sheriff-Principal Crole has presented his portrait to the Society of Procurators of Midlothian. It will be hung in the library of the Society in Edinburgh Sheriff Court House.

Aberdeen.—The practices of Messrs. Allan, Buckley, Allan & Co., advocates (of which Mr. Alan T. T. Whitehouse, advocate, was sole partner), and Mr. W. C. Forbes, solicitor, have been amalgamated as at 1st December, 1921. Mr. Whitehouse and Mr. Forbes will practice under the firm-name of Allan, Buckley, Allan & Co.

Fifeshire.—Mr. J. C. Pitman, K.C., has been appointed interim Sheriff-Principal of Fife during the absence of Sheriff-Principal James A. Fleming, K.C.

Kirkcaldy.—Mr. William Napier, solicitor, has been appointed burgh prosecutor in succession to the late Mr. Alexander Wallace.

Kilwinning.—Mr. Patrick Burns having retired, the firm of Burns & Speir has been dissolved. Mr. Speir has assumed as a partner Mr. John Bell Motherwell Harvie, Glasgow. The business will be carried on under the firm-name of Speir & Harvie, solicitors, Kilwinning.

Law Agents Examinations.—The half-yearly examinations in general knowledge conducted by the examiners of law agents were held in Edinburgh and Glasgow on 17th, 18th, 19th, and 20th ult., and the results have now been intimated to the candidates. For the first examination in general knowledge, which qualifies for apprenticeship, 39 applicants presented themselves. Twenty-one of these have passed or been found qualified in all the subjects, and 11 have passed or been found qualified in two subjects. For the second examination in general knowledge 65 candidates entered. One of these passed in four subjects, 1 in three, 17 in two and 24 in one subject. The papers of the candidates in this examination were as follows:—Mathematics 17, passed 4; Logic 33, passed 14; Latin 31, passed 20; Greek 1, passed 0; French 21, passed 5; German 3, passed 2; Book-keeping 32, passed 20.

Since the examinations held in July last 29 candidates have received certificates of exemption from the first examination in general knowledge in respect of holding Intermediate Certificates of the Scottish Educational Department or other substitute certificates.

At the quarterly examination in law, which was held in Edinburgh last week, 32 candidates presented themselves for examination. Twenty-six of these were examined in all the subjects and 19 passed, and 6 graduates in law holding the degree of LL.B. or B.L. of the Scottish Universities were examined in Court procedure and five passed.

The following candidates have passed the examination in law which was held in Edinburgh on 23rd, 24th, and 25th ult., viz:—James Dunlop Bell, B.L., Glasgow; George Fairholm Black, Edinburgh; John Richmond Bond, Dundee; Stair Dickson Brown, M.A., LL.B., Loanhead; Thomas Craig Caldwell, LL.B., Glasgow; Joseph Cowe, Edinburgh; James Edington, Edinburgh; Henry Davidson Ferguson, Glasgow; William Findlay, Cullen; Donald Benjamin Gunn, M.A., LL.B., Aberdeen; William Nairn Hay, Forfar; James Knowles, B.L., Inverness; Alexander Gray Ledingham, Edinburgh; John Lightbody, Lanark; George James Mackenzie, Paisley; Joseph Rafferty, Paisley; James Renton, Armadale; Alexander M'Millan Riddet, Glasgow; Henry Brownsword Stirling, Johnstone; John Taylor, Edinburgh; William Wilson Terris, Kelty; Douglas David Urquhart, Dundee; James West, Buckie; David Robert Young, Kinross.

Table of Fees in the Office of the Registers of Sasines, Hornings, Inhibitions and Adjudications, and Entails, General Register House, Edinburgh, as Regulated by the Lords Commissioners of His Majesty's Treasury under Section 25 of 31 and 32 Vic. C. 64.

I.—Fees in the Sasine Office.

	Revised Fee. £ s. d.	Former Fee. £ s. d.
I. Registration Fees.		
Recording of Deeds :—		
1. For every page of two hundred and fifty words or under, ...	0 3 0	0 2 6*
And in addition a fee for each Writ as follows :—		
Where the value of the lands or other subjects does not exceed, ... £200	0 5 0	0 5 0
Do. do. £500	0 10 0	
Do. do. £1000	0 15 0	
Do. do. £2000	1 0 0	
Do. do. £3000	2 0 0	
Do. do. £4000	3 0 0	
Do. do. £5000	4 0 0	
Do. do. £10000	5 0 0	
Exceeds, ... £10000	6 0 0	
2. Where a Writ is recorded in more than one County there shall be charged, in addition to the fees above specified, a further fee for each Memorandum of	0 5 0	0 5 0
Writing Fees, two hundred and fifty words or under comprised in each Memorandum, ...	nil.	0 2 6*
II. Extracts.		
1. First Extract of Deed recorded for Preservation :— For every page of two hundred and fifty words or under, ...	0 1 4	0 0 8*
2. All other Extracts :— For every page of two hundred and fifty words or under, ..	0 3 0	0 2 0*
III. Excerpts.		
For excerpts or copies from any Book of Record there shall be charged in addition to the fee for inspection of the Book, per sheet of four hundred words, ...	0 1 0	0 0 6
IV. Dues of Books.		
When fees have been paid in the Department of the Lord Clerk Register for a Search in the Register of Sasines no fees will be charged in the Sasine Office in respect of the continuation in it of such Search.		

II.—Fees in the Horning Office.

I. Registration Fees.		
1. In Register of Hornings and Inhibitions for each sheet of three hundred words, ...	0 4 0	0 2 0
2. In Register of Adjudications, for the first sheet of three hundred words, ...	1 0 0	0 10 2
And in every other sheet, ...	0 7 0	0 3 6
II. For Marking Discharge or Recal of Inhibition, &c.,	0 5 0	0 2 6
III. For Inspection of the Minute Books or Index of Inhibitions and Adjudications for Current Year, ...	0 3 0	0 2 0
When fees for Inspection of the Indexes of the Register of Abbreviates of Adjudications or of the General Register of Inhibitions shall have been paid in the Department of the Lord Clerk Register, no fees will be charged for the continuation of such Inspection in the Horning Office.		
IV. Fees Under the Bankruptcy Statutes.		
For Extracts or Certified Copies, per sheet, ...	0 2 0	0 1 0
For Collating and Certifying same per sheet, ...	0 1 0	0 0 6

III.—Fees in Register of Entails.

For recording an Instrument of Disentail, with the Decree of the Court on which it proceeds, or an Excambion or other Deed or document—each sheet or part of a sheet, ...	0 12 3	0 6 1½
For the Keeper's Docquet of Recording, ...	2 2 0	1 1 0
For a Search in the Register of Entails for any such document, ..	0 5 0	0 2 6

* Adjusted to typed pages of two hundred and fifty words.

THE

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SHERIFF COURT DUES.

A DEPARTMENTAL Committee, which had been appointed to inquire into the status and remuneration of the staff of the Sheriff-clerk's and Fiscal's Department of the Sheriff Courts in Scotland in December, 1920, made a report, in which they made certain recommendations as to improved remuneration and retiring allowances. But it is one thing to recommend and quite another thing to obtain Treasury sanction for increased expenditure of any sort, and so the recommendations were hung up. Meantime another Departmental Committee was appointed to consider the existing tables of Court dues, both in the Court of Session and the Sheriff Courts, and to report whether, "with due regard to the public interests and to costs "of litigation," the proposed increase in staff remuneration could be met by increasing the Court dues, and so avoid dipping at all into the pocket of the general taxpayer. Last month this second Committee made an interim report, dealing with the Sheriff Courts, and presenting a suggested amended table of Court dues. This has been now adopted in its every detail by the Lords of Council and Session, who are empowered by sec. 40 of the Sheriff Courts Act, 1907, to regulate, with the concurrence of the Treasury, the scale of Court dues. The Act of Sederunt giving statutory sanction to the recommendations of the Departmental Committee is dated 22nd February, 1922; and the new table becomes operative on 1st April, 1922. Its effect, as estimated by the Committee, will be to increase the yield to the Treasury from Sheriff Court dues by in round figures some £25,000 a year, and so bring up the total yield to roughly £75,000, which would enable the Treasury to give effect to the recommendations of the first Committee as regards remuneration of the Sheriff-clerk's staff, and still leave the Treasury with a trifle of some £20,000 a year as surplus yield

from Sheriff Court dues—not at all a bad contribution from the humble Sheriff Courts of Scotland, and a quite fair source of revenue for the Chancellor of the Exchequer to tap; for, after all, litigation is a luxury, and there is no reason why those who indulge in it should not contribute something substantial to the National Exchequer, to help the great cost of manning the Courts of law, and running them for the benefit of the community.

In their revision of the existing scale of fees, the Departmental Committee seem to us to have displayed very considerable tact. Their increases upon existing fees are so small as to be hardly appreciable in an individual case, although in the aggregate they come to a substantial sum. To increase, for instance, the fee for a warrant to register an irregular marriage from 5s. to 10s. is a small affair to an individual bridegroom; but when one reflects that some 8000 of such warrants are issued in Scotland in a year, the increase is of some significance. So also, in an individual case, an increase of 1s. on the cost of a summons to the Small Debt or Summary Ejectment Court is a trifle, but, as not less than 40,000 of such writs are issued annually, there is something substantial in it. The task the Departmental Committee set before themselves was to spread their increase recommendations over the whole area of the Sheriff Court operations, and thus avoid fixing any individual fees which might be regarded as putting an obstacle in the way of the poorer members of the public obtaining justice at a reasonable cost. They are to be congratulated on the way they have accomplished their task, so far as the Sheriff Court is concerned, and they will no doubt display the same tact in dealing with the Court of Session. We sincerely trust that the Treasury will deal with their share of the work in the same spirit as the Committee have, by treating the Sheriff-clerk's staff separately, and that, as regards them, the necessary financial arrangements may be made at once. In these times, perhaps, a Chancellor of the Exchequer may be tempted to say that the Treasury cannot move at all, till they have a report upon the whole remit; or to plead that the new table must be in operation a year before he can be sure that he will be in funds to make increases in remuneration. But the Committee, in their estimates of the yield of the new figures, have, we think, taken a quite conservative view of the probabilities, and the Sheriff-clerk's staff have already waited long and patiently for more adequate recognition of their work. By the time the new table comes

into operation in April, it will be over fifteen months since the first Committee reported; and several years since the staff brought their grievance before the Government. Now that it has been recognised as a genuine grievance, and means for its remedy have been provided, it is to be hoped that departmental methods may not intervene, as, unfortunately, departmental methods often do, to delay the scheme being put into practical operation.

STIRPITAL SURVIVANCE: A REJOINDER.

UNDER this somewhat cryptic title appeared an article in last month's issue over the decision of the House of Lords in *Curle's Trustees* v. *Miller*. The writer declared truly that the judgment had caused somewhat of a "thrill" among legal people, and he has rushed to the aid of the learned law lords in justification of their most surprising judgment. The title in many respects partakes of all the characteristics of a nightmare. If such a subject had been made the test *sine qua non* of admission to the profession of the law prior to the decision in question, the percentage of passes for solicitors in Scotland would have been remarkably low. Probably, under the same condition, all intending entrants for the bar would have been sent down. The rejected would have had good cause of complaint against their examiners. The subject is not discussed or referred to in any Scots law text-book, institutional or otherwise, except perhaps incidentally in a work on Vesting, of which the index gives the consultant no indication. It would have been, therefore, extremely unfair for examiners to have delved into foreign law, albeit English, and to have postulated as a conundrum any query based on purely speculative discursions of English judges. The only possible candidate with any chance of passing would have been the writer of the able article under review. From his youth, legally speaking, he seems to have been familiar with stirpital survivance as a plant, according to him, of Scottish growth. No one else hitherto seems to have known of it, barring the four law lords responsible for the singular judgment. True, Lord Shaw, of Dunfermline, was one of these law lords, and by common consent he is a pre-eminent judge. But his practice at the bar was not concerned so much with the construction of testamentary documents as with commercial disputes and jury causes, and sometimes an occasional aristocratic consistorial suit. Lord Atkinson is an Irish lawyer. Lord Wrenbury, although a Chancery lawyer of distinction, was lucratively "limited" in his bar days to company cases. Lord Sumner was

a commercial lawyer. All these lords, save Lord Shaw, derive their knowledge of Scots law at second hand. Not one of the four participants (including Lord Shaw), in the judgment was a Chancery pleader in the same sense as the late Lord Parker, of Waddington, or as the present Lord Buckmaster. Lord Shaw is, therefore, mainly responsible for the introduction of stirpital survivance into Scots law. His responsibility arises from the absence of any protest on his part as a Scots lawyer, and to the complacency of his concurrence in the opinions of his English or Irish colleagues as harmonising with Scottish law. Was our law lord, metaphorically speaking, asleep? Sometimes, like Homer, judges nod. Even Lord Blackburn—not the Lord Ordinary—has been charged with this fault by one of his distinguished successors in the Lords as accounting for a confusion of thought, so rare with that great judge, in one of his opinions (see L. Dunedin, 1920, A.C. p. 297). Perhaps, some day, a successor of Lord Shaw may explain on a similar ground his opinion in *Curle's* case. It is already giving great trouble to lawyers as well as distress to beneficiaries in suggesting the reconstruction of trusts ruled by it in regard to the future distribution of trust revenue among a different set of interests.

The writer of the article under consideration finds no fault with the judgment. Injustice may have been done to Lord Shaw by adverse criticism of the decision. By clear implication, however, the writer convicts the learned judges of the First Division of astonishing ignorance of our own law! Is the writer right? It is thought not. He has evidently been caught in the current storm of hypnotic suggestion. It must be a curiously complex proposition that needs to be supported by such an article expressed as it is in semi-algebraic signs. However ingeniously stated, most students of law after reading such a composition are probably as wise as students of science after the perusal of a recondite paper or address on relativity by a certain accomplished lawyer, philosopher, scientist, statesman, and politician, of the present day. Taken up into the clouds one remains there! Mount Everest never comes into view! Let us deal, however, with the writer's trilogistic apologia.

Was the decision *novel*? The writer admits it was and argues that it was not. Its principle was never applied before in Scots law. But it was, he says, no stranger amongst us for those who had eyes to see. With refreshing simplicity we are referred to the *obiter dicta* of Lord Kinnear in *Ward* v. *Lang*. Surely, most

lawyers are aware that in judicial circles urbanity receives its finest display. In canvassing the opinions of their brethren, deceased or living, judges must be extremely polite. Lord Kinnear could hardly be expected to describe Lord Selborne's "immortal" conception as "bizarre." Lord Macnaghten, knowing Lord Selborne better than Lord Kinnear and much better than Lord Shaw, went as far as he could without infringing the accepted canon of courtesy when he referred to the figurative reasoning of Earl Selborne as "forced and fanciful" (see *King*, 1890, 15 A.C. 548). But text-writers use greater plainness of speech. The editors of Jarman, a work of the greatest authority in England on this branch of the law, treat the "concept" of this particular Lord Chancellor as one undeserving of serious consideration (see p. 2107 of the second volume of the current edition). So, it may be easily imagined, stirpital survivance was not only a novelty in English law but it was not even accepted as good law in England prior to this unique but unfortunate judgment. It is simply ridiculous to say that, by reference to *Aberdein*, 1870, 8 M. 750, our Scottish judges anticipated the discovery of Lord Selborne in either *Wake* v. *Warah* or *Waite* v. *Littlewood*, and that letters patent so to speak should have been granted to our judges. The case of *Aberdein* was treated as a *casus improvius*. It is not difficult to affirm that that decision would never have received the approval of that most eminent lawyer, Lord Rutherfurd Clark (see Paterson's Trustees, 1894, 21 R. 253). Indeed, the writer misreads the Scottish cases. They may be upheld as based on the theory of giving rights to issue by implication. They give no countenance to the theory of ignoring plain language, excluding any such possible implication. If "survivors" cannot mean "others," how can it mean "descendants"? Yet, this is the result of the decision.

Was the judgment *unconstitutional*? It is doubtful if the writer of the article understood this point. The protest of Chief Baron Palles in *O'Brien*, 1896, 2 Ir. R. 459, was well founded. If the rule *Wake* v. *Warah* was regarded in the opinion of the Chief Baron as alien to the law of Ireland (akin in this matter much more to the law of England than to our law), the charge of violating the Treaty of Union of 1707 seems well supported. Let the writer of the Article refer to *Royal Bank*, 1882, 9 R. (H.L.) 67.

Was the decision *wrong*? Here the writer seems far out at sea. He justifies his conclusion on the strength of the views of the Lord Ordinary. But, *ex concessu*, the opinion of the Lord Ordinary did not find favour in the lords. Judges, like

witnesses, are estimated from the days of Rome downwards, not by number but by weight. The Lord Ordinary cannot be counted in any case for the reason stated as a supporter of the rule upon which the ultimate judgment was based. Upon this footing it is agreed that the judicial opinions were equally given for and against the rule. Every one of the four judges of the First Division had been a Chancery lawyer in practice within the sense already referred to. Not one of the four law lords can claim the same distinction. Therefore the four law lords and their protagonist have not convinced us either by their position, known in the case of the law lords and unknown as regards the writer, or by their respective reasoning, that the judgment in question was right. The function of judges is to interpret and not to legislate; to construe and not to construct. It was, plainly, the determination of *boni viri* acting as quasi arbiters, if indeed, not as legislators. And so the mass of the profession thinks. It is, indeed, a pity that the law lords should have felt themselves at liberty to ignore the law as set forth in *King* v. *Frost, supra,* because it was only a Privy Council case. It was duly brought under their notice in the Respondents' case. The whole idea of setting up this weird theory of stirpital survivance against the express words of a will arises from the desire, very humane, to reach an equitable result in a hard case. But hard cases make bad law. Sympathy is an ill ground of judgment. So said both Lord Kyllachy and Lord Dunedin on various occasions.

But all pleaders, young and old, can take heart of grace. *Curle's* case was regarded as desperate before the hearing was reached. Lord Bramwell once said, "No case is desperate when "plain words may be disregarded," and particularly so, as his lordship observed in the same case, when one resorts to metaphorical expressions in its solution. The very short and neat Case of Mr. Maugham, K.C., for the appellants never attempted to justify *Aberdein* as an illustration of metaphorical survivance. *Wake* v. *Warah* was thrown into their case by a single sentence as worthy of consideration on "the high authority of Selborne, "L.Ch." No suggestion was made in the Case that it was any part of the law of Scotland. The desperate case presents, however, the moving appeal that in the 100 to 1 chance succeeds. It was a personal victory for Mr. Maugham. His adroitly seductive argument captured the Lords.

After all, however novel, unconstitutional and unsound the judgment may have been, there is some good advice in the concluding sentence of the article in question that wills should

be framed in paragraph form. Let us make the additional suggestion that the introductory paragraph should run, "In "the name of God. Amen. Deliver this will, O Lord, from "the English constructional rule of stirpital survivance!"

LEGAL EDUCATION IN SCOTLAND: A CRITICISM.

[Contributed.]

In his recent inaugural address to the Juridical Society of Edinburgh the Lord Justice-General epitomised the ideal to which the legal profession should strive to attain in the phrase, "the favourable conjunction of trained intellect and courageous "character." No man, of course, by taking thought, can suddenly acquire for himself, or directly impart to others, the qualities which go to the formation of "courageous character." These are the fine fruits of too subtle influences to be capable of forced cultivation. The "training of intellect," however, stands on a different footing; for in this field there will always be ample scope and pressing need for well-directed educational activity on the part of our legal associations. But the duty which they owe, both to themselves and to society at large, to contribute of their best towards progressively perfecting legal education, and so adapting the machinery of the law adequately to perform its ever-widening functions, is one which for long has been virtually ignored.

At any time this attitude of detachment and indifference would be reprehensible; but at the present moment it is doubly so. The last fifty or sixty years have witnessed the inauguration of a period of transition in our jurisprudence. Under the increasing pressure of modern legislation, feudal law, in the widest sense of that term, including all those doctrines and topics which form the foundation of our institutional works, is slowly but surely receding into the limbo of legal antiquities; but, though the "old order changeth, giving place to the new," it has still vitality enough to make insistent demands upon student and practitioner alike. Simultaneously with the decline of the older law, there has been in progress the rapid and infinitely multifarious development of mercantile law; and the present-day student is accordingly compelled not only to cover all—or nearly all—the old ground, but also to explore in detail whole continents of which Stair and Erskine never dreamt, or were vouchsafed only the most fleeting of "Pisgah glimpses." But, notwithstanding the patent need for a complete review of educational methods to meet altered conditions, and notwithstanding the advance which has been made in recent years in the study of the science of teaching, it is a truly remarkable

and lamentable fact that the requirements of our legal associations from their intrants, and the legal curricula of our Universities, are substantially the same to-day as they were a generation and more ago.

No legal body in Scotland provides organised instruction in law. All except one—the Signet Society—accept substitutes for their entrance examinations. Consequently the direction of legal education in Scotland falls upon the Law Faculties of Edinburgh, Glasgow, and Aberdeen Universities, although the character of the training which these institutions afford is deeply influenced by the regulations for admission to the legal societies, as well as by the direct control exercised by representatives of these societies on the governing bodies of the Universities. Accordingly, in what follows reference is made almost exclusively to the law curriculum of the Universities, and particularly of the University of Edinburgh.

The education of the law student naturally falls into three parts, viz. (1) general education; (2) theoretical instruction; and (3) practical training. The line of demarcation is not a hard-and-fast one, and all three members of the triad are closely inter-related. But any educational scheme which fails to make adequate provision for each branch is radically defective.

1. *General Education.*—In these days of high pressure and utilitarian sentiment, the temptation to premature specialisation in professional studies is a strong one, and it is not surprising that the Universities have partially succumbed to it. The student who contemplates graduation in both arts and law is now free to offer two legal subjects as part of the five required for graduation in arts, thus reducing his arts curriculum proper to three distinct subjects. This concession is, of course, designed to shorten the time required for the double degree; but is it justifiable in principle? If there is one quality more than another which makes for success in the practice of the law it is mental adaptability. The catholic outlook which is derived from a liberal education combining breadth with a modicum of depth, is a *sine qua non* for any one who may be called upon at short notice to assimilate rapidly and to expound intelligently subjects so diverse as electrical engineering and physiology, or advanced accountancy and navigation. A competent knowledge of these and numberless other subjects is, needless to say, unattainable; but there is nothing unduly ambitious in the attempt to acquire the disciplined habit of mind and the intellectual breadth which enables a man confidently to attack any problem, however unfamiliar and however technical. These qualities, and, above all, the proper

development of the analytical faculty, which is the practising lawyer's indispensable auxiliary, cannot be attained under any narrow and restricted educational scheme. For these reasons, it is suggested that, so far from countenancing overlapping between the arts and law curriculum, or sanctioning specialisation by law students in single groups of subjects, the academic authorities would promote the best interests of the average student by insisting upon the postponement of legal study until the arts curriculum had been completed, and by requiring aspirants to the double degree to select their curriculum upon the most comprehensive basis consistent with the student's aptitude

2. *Theoretical Instruction.*—Theoretical instruction and practical training in law are mutually complementary. The futility of a merely doctrinaire knowledge of legal principles is too obvious to require exposure. Much less obvious, but no less real, is the futility and inadequacy of a curriculum which presents law mainly from the practical standpoint of an applied science. Just as a sound knowledge of anatomy is the almost invariable pre-requisite of training in surgery and clinical medicine, so it is essential that the law student in his early days should view the jurisprudence of Scotland as an organic whole, that he should see its various branches logically analysed, and their correlation scientifically expounded, and there should be inculcated into him at an early stage a sound appreciation of the ratio of legal principles in their origin and subsequent development. This is a need which the Scottish Universities do not adequately supply. In their present curriculum and lecture system an unfortunate attempt has been made to give theoretical instruction not as an end in itself, but as a means of imparting practical training, and the result presents the excellences of neither branch and the defects of both. The student is denied the opportunity of studying Scots law as a system of jurisprudence and is invited instead to learn his business by means of a protracted series of oral "corre-" spondence courses," with the additional drawback of having to take down each "course" to the dictation of his lecturer. To-day, as in Lord Shaw's student days, "law is taught as a "trade and learned as a trade." Now, as then, the image of Scottish jurisprudence, "serene, splendid, and august, is "never beheld, even in a vision."

This unsatisfactory state of affairs is due in part to the almost fantastic confusion in the arrangement of courses. Taking Edinburgh University as an example, there is substantial overlapping between the subjects dealt with in Scots law on the one hand, and in (1) mercantile law, (2) industrial

law, (3) accounting and business methods, (4) landlord and tenant, and (5) banking, on the other hand. The first, third, and fifth of the latter group of subjects also mutually overlap. Such topics as sequestration, liquidation, and negotiable instruments are expounded by at least three different lecturers in three different classes. In place of a well-thought-out and logical scheme of study, the curriculum is forced to conform to the haphazard arrangement in which the chairs were founded —several of them in the eighteenth century. Further, the requirements of the academic authorities as to attendance at classes is equally incapable of justification. To Scots law, which is by far the most important and comprehensive class, only eighty lectures are assigned; and precisely the same amount of time has to be devoted both to civil law (two-thirds of which is truly Roman antiquities), and also to constitutional law and history (which is simply British history *minus* foreign policy). If the whole realm of Scots law is deemed capable of being surveyed in eighty lectures, the allowance of forty lectures for such relatively restricted subjects as administrative law and forensic medicine seems somewhat excessive. Finally, there is apparently nothing in the regulations to prevent a student taking the courses in any order he likes.

The plain truth of the matter is that the present scheme is palpably illogical, and wholly out of touch with modern conditions and requirements. What is required is not merely reform, but complete reconstruction. The present curriculum is founded upon the principle of unequal emphasis, and is maintained in existence by sheer force of inertia. Difficulties there may well be in altering foundations and allocating endowments; but there are such things as provisional orders and private Acts of Parliament.

(3) *Practical Training.*—It has been stated that the compromise adopted in the Scottish Universities is to attempt to provide practical training by means of theoretical instruction. While the method of approaching the study of law from the standpoint of an applied science largely detracts, as we have seen, from the real value of the theoretical instruction, the practical training equally fails to meet the necessities of the case. An acid test of the character of the training is to be found in the degree examination questions. A perusal of the questions set over a period of years discloses a marked tendency to a stereotyped and periodically recurring form of inquiry calculated to elicit as an answer a short extract from the lectures on the subject in question. The more faithful the reproduction, the higher are the marks awarded. The student who

attains complete success under this method will have a rude awakening when he realises on entering upon the practice of his profession that actual problems do not present themselves in stereotyped form, but that by far the most difficult question which the lawyer has to meet is to ascertain what the real problem is by isolating the true issue from a confused mass of partly relevant material. Another defect of the present system is that it is a direct encouragement to the student to apply himself to the study of the lectures alone. It is possible—*experto crede*—to graduate with distinction in law without having acquired even a nodding acquaintance with the law reports and the standard works which the student will have to handle familiarly for the rest of his life, without having seen a closed record, and without having heard of, much less understood, the term "relevancy."

Apart from the school of experience in a lawyer's office or the Parliament House, these deficiencies might be supplemented in various ways. The substitution of the concrete problem for the stereotyped inquiry, insistence upon the study of current law reports, attendance in law Courts, organised debating societies, and work in "legal dispensaries"—all these would help to clothe with flesh the skeleton training with which the student has at present to rest content.

The above reflections are offered not in any spirit of captious criticism, but in the hope of provoking discussion and arousing among the members of our legal societies a sense of the duty which they undoubtedly owe to their profession to ensure that those who come after them will be adequately equipped for the practice of the law. The study of law is, of course, a task for which a lifetime is far too short. But it is a matter of the supremest importance for the future of the profession that the foundations of such a lifework should be well and truly laid in a sound professional training. In the present position of matters a student may graduate as a Bachelor of Laws of a Scottish University without being competent to handle intelligently the simplest piece of professional work, and without even knowing where to procure the information how to do it. Is the perpetuation of this system creditable, or even tolerable?

T. M. C.

THE PLEADER.

Although the sum involved in the Dundee harbour cases (*Anchor and Ellerman Line* v. *Trustees of Harbour of Dundee*, 1922, 1 S.L.T. 137) were large and the proceedings voluminous, yet the point involved was the simple one, whether the

defenders had been negligent, their negligence having to be inferred from the facts. The case, therefore, does not call for particular comment here, but the statement by Lord Haldane as to the relative positions of negligence and contributory negligence should be noted. After laying down the position that those entering the harbour were entitled to expect, on defenders' part, the exercise of reasonable care to warn them of danger, his lordship proceeded. On the other hand, those approaching with their vessels must, notwithstanding their right to rely on such care having been exercised, use care on their own part not to incur peril rashly. For, as Lindley, L.J., said in the "Bernina" (12 P.D., at p. 89)—"If there "has been as much want of reasonable care on A's part as on "B.'s, or, in other words, if the proximate cause of the injury "is the want of reasonable care on both sides, A cannot sue B. "In such a case A cannot with truth say that he has been "injured by B's negligence; he can only with truth say that "he has been injured by his own carelessness and B's negli-"gence, and the two combined give no cause of action at "common law."

In all such cases B must prove affirmatively the contributory negligence of A, and the burden lies on him to do so. He cannot discharge this burden if A can show that what he did he did relying on an assurance, expressed or implied, from B of his safety in taking the course he did; but, on the other hand, it may be shown against him that, notwithstanding his title to rely on that assurance, he used his freedom to do so in such a fashion as a prudent man in ordinary circumstances would not have done, and that his own negligence led to the actual damage. The question whether he has been thus negligent is, as a rule, at least as much one of fact as of law. For the measure of the legal obligation in cases where negligence is alleged cannot readily be laid down *a priori*, apart from consideration of all the material circumstances in each individual case. No merely general principles can extend to all the concrete details of which account has to be taken in estimating whether there has been imprudent action; and for this reason the question of negligence is largely one for a jury or for a judge of fact, who will estimate, according to the standards which regulate the daily behaviour of ordinary but prudent men, the whole circumstances in each individual instance, and pronounce, in accordance with accepted standards of conduct, how a reasonable man ought to have behaved.

The cases of *Smith & Ingles* v. *Assessor for Edinburgh* are useful authorities on the point that though a house may be let to a relative of the owner at a lower rent than the rent which he

might have got from an outsider, that does not prove that the let is not a *bona fide* let so as to justify the assessor in putting a higher figure in the valuation roll. In both cases, however, the rents which were in question were substantially adequate, and were economic rents.

The extensively used provision of the Companies Act as to alteration of articles came to be for consideration in *Crookston* v. *Lindsay*, 1922, 1 S.L.T. 62. The Act provides—Sec. 13 (1). Subject to the provisions of this Act and to the conditions contained in this memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution. Notwithstanding its apparently wide terms, for the complainer it was maintained that the power of alteration conferred by sec. 13 of the Act of 1908 is not absolute; that there is an implied condition that the power shall be exercised in good faith for the benefit of the company as a whole. And those making use of the section would be well advised to consider the cases of *Brown* v. *The British Abrasive Wheel Company, Limited*, 1919 1 Ch. 290; *Sidebottom* v. *Kershaw, Leese & Co., Limited*, 1920, 1 Ch. 154; *The Dafen Tin Plate Company*, 1920, 2 Ch. 124. These cases and others have been reviewed by Lord Ashmore in the case of *Crookston* v. *Lindsay*, and he found that an alteration under sec. 13 of the Act is not invalid merely because it may have the effect of prejudicing the rights under the original articles of a particular shareholder or class of shareholders.

The proposed alteration in this case was to the effect that "any member desiring to sell shares held by him shall first ". . . . offer them to the directors for purchase by them "or their nominees at par"; and the action was one of suspension and interdict against the company confirming the resolution. The Lord Ordinary refused the note of suspension and interdict.

It has always been a well-recognised rule of the Court that a mere temporary setback in an industry was no reason for altering the yearly value of heritable subjects which, when once properly fixed, must be considered as being a more or less permanent figure. If it could be shown, on the other hand, that the causes of this collapse were likely to be permanent, then it was right that that condition of matters should be reflected in the value of the heritage.

An exception to this rule has been allowed in the valuation case concerned with the Lanarkshire steelworks, and they have received an abatement in their valuation on the ground

that foreign competition was a relevant consideration in fixing the annual value, and would be taken into account by a hypothetical tenant in offering a rent for the works; that in view of these considerations and the possibility of these tending to keep the steel industry in a depressed condition for an indefinite period, it was equitable to make a reasonable deduction from the annual value arrived at on the contractor's principle. Nevertheless, that this is only a special exception is clear from the guarded opinion of Lord Cullen.

It appeared to his lordship to be a delicate and doubtful proceeding to lower the valuations, otherwise fairly arrived at, of business premises where there has been, as here, a prosperous past and the tenants or owner-occupiers were carrying on, merely because there had begun a period of depression in the particular industry, the continuance of which in the future was a matter of prediction or conjecture, based on very complex considerations of which it was very difficult to make a reliable appreciation. They were, however, reviewing the determination of a Valuation Committee who, as this exceptionally well-presented case showed, had applied their minds with great care, fairness, and ability to the many difficult questions raised in it; and they had satisfied themselves that the depression in the industry which had now begun was likely to continue for so long a time that it was justifiable to treat it as being what he might call a *quasi*-permanent condition. His lordship could not say that he felt so well assured of the reliability of this conclusion as did the Valuation Committee; but at the same time he did not think they should be justified in differing from them except on clear grounds. He was, therefore, prepared to accept their view that these steelworks presented an exceptional case, in which it was legitimate to make some abatement in respect of highly adverse trade conditions which were likely to continue for a long period. He desired, however, distinctly to guard against the notion that their lordships were laying down or acceding to any general rule to the effect that, in the ebb and flow of prosperity in a continuing industry, any temporary onset of adverse conditions fell to be reflected in the annual value of the heritable subjects which continue to be occupied for the purposes of the industry.

THE LATE MR. ARCHIBALD BROWNLIE, GLASGOW.

By the death of Mr. Archibald Brownlie, solicitor, Glasgow, which occurred on Tuesday, 14th February, the legal profession loses one of its members who has for thirty-five years held an honourable place as a practitioner in Glasgow. On the forenoon

of the day on which he died Mr. Brownlie was actively engaged in business in his office; and those who came into contact with him were impressed by his vigour and cheerfulness. In the early afternoon, however, an apoplectic stroke rendered him unconscious, and, on the advice of a doctor who was called in, he was taken to his home at Newlands, where he died the same evening without regaining consciousness.

Mr. Brownlie, who was born in 1861, was a native of Glasgow, and received his schooling at the old Free Church Normal School. His father having died when he was in early childhood, he, while still quite a lad, left school and entered the office of Messrs. Kidstons, Watson, Turnbull & Co. There his apprentice master was Mr. James Burns Kidston, sen. Mr. Kidston's kindliness, keen sense of humour, and high standard of professional rectitude, and, above all, his sincerity and hatred of all that savoured of time-serving or advertisement, left an abiding impression on his young apprentice. And to the end of his life Mr. Brownlie remembered and acknowledged with gratitude the training which he received in Messrs. Kidston's office in these weighty matters, no less than the instruction which he got in the more technical equipment for his profession. While engaged in his apprenticeship he attended arts and law classes at Glasgow University; and, although circumstances which made him desire to qualify as soon as possible precluded him from spending the time necessary to take a law degree, he acquired an appreciation for the scholarly as well as for the practical side of his legal studies. And in after life, in advising young men as to their career, he was wont to impress on them the expediency of giving, where at all possible, the time required to take a law degree, both for the breadth of view to which it led, and for the sake of the permanent link with the University which it secured.

Mr. Brownlie was admitted as a law agent in 1887. He remained for three years longer with his old firm in a position of trust, being latterly much associated with that genial gentleman and keen Volunteer, the late Colonel John Kidston. In 1890 he started business on his own account in partnership with Mr. John George Stevenson, and soon built up a large and good practice. Later the partnership was dissolved by mutual consent.

In his earlier years Mr. Brownlie did a considerable amount of Court work. His pleading was characterised by care in preparation, grasp of legal principle, and lucidity and vigour of statement, which won him the respect of the Courts, and which, had he cared to devote more time to Court work, would doubtless have secured for him a prominent place as a pleader. But as time went on he found it increasingly irksome to endure the interruption to his office work which Court practice entails. And in later years, while, when the interest of a client required him to appear in Court or before an arbiter, he did so with acceptance, he gradually confined himself more and more to

chamber practice. It was in this that he chiefly excelled. His sympathy and shrewd common sense, combined with a sufficient knowledge of law and unfailing industry and method in business, gained for him a large and ever-increasing circle of clients, to many of whom he was not merely their legal adviser, but a trusted counsellor and friend.

Outside of his professional work Mr. Brownlie had many interests. Always sensible of the duty which a lawyer owes to his profession, he interested himself in the work, and served on committees of the Faculty of Procurators in Glasgow, though he did not take a prominent part in its affairs.

Mr. Brownlie married in 1892 the only daughter of the late Mr. John G. Christie, sugar merchant, Glasgow, by whom, as well as by a son and three daughters, he is survived.

Literature.

SHERIFF COURT STYLES. By Sir John M. Lees. 4th edition. By T. A. Fyfe. Edinburgh and Glasgow: William Hodge & Co., Ltd. (36s. net.)

To the young agent just entering practice, Sheriff Fyfe's edition of Sir John M. Lees' Sheriff Court Styles, just published, should be very welcome. Even at the present time the 1892 edition of Sheriff Lees' Style Book is probably more used —and used with more profit—than any other work on Court practice; deservedly so, for long experience has tried it, and it has rarely, if ever, been found wanting.

Since the last edition, in 1892 much new legislation has been introduced, not the least important being the Sheriff Courts Acts, 1907-1913, which made radical changes both in the work of the Sheriff Court and in the forms of pleadings. Coming as it does at a period sufficiently removed from the introduction of the 1907-1913 Acts to allow of the benefit of actual Sheriff Court experience of the working of the new Acts, this book of styles should have little difficulty in taking precedence over existing style books. The order of the third edition has been adhered to, and the references and annotations brought down to date. Additional new styles have been introduced where rendered necessary by supervening legislation. The most notable additions in this respect are styles under the Workmen's Compensation Acts, 1900-1919; Burgh Police Acts, 1892-1903; Bankruptcy Act, 1913; Housing and Town Planning Act, 1909. We should have liked to have seen a little more space taken up for the various styles under the Workmen's Compensation Acts, as this has now become one of the most important branches of Sheriff Court practice. We would have thought that the Married Women's Property (Scotland) Act, 1920, might have done away with the necessity of retaining forms under the Married Women's Property Acts, but Sheriff Fyfe, in a footnote, gives his reason for retention,

that " titles may exist, however, which are so expressed as to " make a timid purchaser from a married woman still to desire " a declaration by the Court." Apparently he does not share the view we have heard expressed that the unequivocal terms of the Married Women's Property (Scotland) Act, 1920, should have satisfied the most timid or fastidious agent. On this point Sheriff Fyfe's long practical experience has probably kept him on the safe side.

We cannot here go over all the points that occur to us. The book deserves and will receive a warm welcome from the profession. Sheriff Fyfe, as all who know him either as judge or author will admit, has this great quality, that when he gives as opinion he does so definitely: he does not try to " save his " face " by reservations and half-hearted expressions. His style is definite, practical, and absolutely free from verbiage. It may have, on the other hand, the defects of its qualities, as the saying is, but the qualities it possesses are essentially important for the lawyer, whether as adviser, judge, or author.

Company Forms. Draft Memorandum and Articles of Association of a Private Company (Table A not adopted). By G. W. Wilton, K.C., and T. M. Cooper, Advocate. Edinburgh and Glasgow: William Hodge & Co., Ltd. (10s. 6d. net.)

This is the first of a series of forms specially designed for the use of Scottish practitioners. Frequently it is considered desirable, instead of adopting Table A, with the modifications which are inevitable in doing so, to have articles printed in full, and this form provides, in addition to a standard form of memorandum, a comprehensive set of articles which can be readily adapted and adjusted to suit the circumstances of any particular company. For convenient use as a draft the form is printed on one side only, and has ample margins. It has also numerous footnotes containing valuable hints and references to authorities.

Delegated Legislation. By Cecil T. Carr, LL.D., of the Inner Temple, Barrister-at-Law. Cambridge University Press. (7s. 6d. net.)

This little volume of seventy-two pages contains, as the author tells us, the substance of three lectures delivered at Cambridge in April, 1921. Although delegated or secondary legislation covers a wider field, the main object of the book is an examination of the character of the swollen stream of recent statutory rules and orders. It may come as a surprise to many to learn that the annual volume of public general statutes for 1920 occupied less than six hundred pages, whereas the two volumes of statutory rules and orders for the same period occupy about five times as many. Nor do these rules and orders always confine themselves to merely subsidiary matters; and the author proceeds to formulate the safeguards which ought to be observed by Parliament in delegating its legislative authority.

In addition to 109 statutes, 24 cases are cited, and there are appendices containing the Rules Publication Act, 1893, and relative regulations, list of official publications, and specimen rules and orders. The book is well written, and commands the attention of all who, in or out of Parliament, are interested in subjecting to reasonable control this activity of departmental government.

Obituary.

At Edinburgh, on 7th February, Mr. William Dunbar, Sheriff-Substitute, Kilmarnock, aged forty-five. Sheriff Dunbar was educated at George Watson's College, the University of Edinburgh, and at Trinity College, Oxford, where he took his degree. He was admitted a member of the Faculty of Advocates in 1904, and was appointed Lecturer in Civil Law in the University of Glasgow in 1909. In 1917 he was appointed Sheriff-Substitute at Stornoway, and in the spring of last year he became Sheriff-Substitute of North Ayrshire. He leaves a widow and three children.

At Edinburgh, on 8th February, Mr. James Rankin, S.S.C. Mr. Rankin was admitted a member of the Society of Solicitors in the Supreme Courts in 1893.

At Kirkcaldy, on 11th February, Mr. Alexander Thomson, solicitor and notary public. Mr. Thomson was senior partner of the firm of Alexander Thomson & Whyte.

At Edinburgh, on 13th February, Mr. George Croll, solicitor. For some years Mr. Croll practised in Aberdeen, and went later to Edinburgh, where he confined his practice to the inferior Courts.

At Edinburgh, on 15th February, the Right Hon. Lord Dundas, one of the Senators of the College of Justice, aged sixty-eight. Lord Dundas was the youngest son of Lord Manor, and was educated at the Edinburgh Academy and Baliol College, Oxford. He was admitted a member of the Faculty of Advocates in 1878, and in 1897 he assumed the rank and dignity of Queen's Counsel. He became Solicitor-General in 1902, and in 1905 he was appointed to a seat on the Scottish bench through the resignation of Lord Moncrieff. Upon the resignation of Lord Stormonth-Darling, in October, 1908, he became one of the judges of the Second Division.

At Edinburgh, on 16th February, Mr. Andrew Nicolson, of Messrs. Winchester & Nicolson, S.S.C. Mr. Nicolson was born in Pittenweem, and began his career in the office of Mr. T. J. Gordon, W.S. He afterwards served with Messrs. Lindsay, Howe & Co., W.S., and Mr. George Andrews, S.S.C. He joined Mr. Winchester in partnership in 1886.

At Leven, on 17th February, Mr. J. Ogilvy Shepherd, senior partner of Messrs. W. & J. Ogilvy Shepherd, aged sixty.

A native of Dundee, Mr. Shepherd served his apprenticeship with Messrs. Shiell & Small, Dundee, and afterwards removed to Edinburgh, where for a good many years he occupied a responsible position with Messrs. J. & F. Anderson, W.S. Twenty-two years ago he joined his brother, the late Major William Shepherd, in Leven, becoming the joint agent of the Royal Bank. He is survived by his widow.

At Edinburgh, on 28th February, Mr. Patrick W. Campbell, W.S., aged seventy-two. Mr. Campbell was a native of Ayr, and was educated at Edinburgh Academy and Edinburgh University. In 1873 he joined the firm of Messrs. Mylne & Campbell, W.S., and two years later he was admitted a Writer to the Signet. He remained with the firm of Messrs. Mylne & Campbell till 1892, and after that date he was a partner of the firm of Messrs. Campbell & Martin, W.S. From 1883 to 1893 he acted as election agent for Mr. Gladstone. On the death of Mr. John Martin, in 1893, he was appointed a principal Clerk of Session, and until he retired a few years ago, on a rearrangement of the offices, he acted in the Second Division. He was a director of a number of investment companies, and for over quarter of a century his opinion was much sought after in the matter of investments and other financial questions.

At Cheltenham, in February, Mr. John Maitland, advocate, aged eighty-one. Mr. Maitland was educated at the Edinburgh Academy and at University College, Oxford. In 1866 he was admitted a member of the Faculty of Advocates, and subsequently became member of Parliament for the Stewartry of Kirkcudbright from 1874 to 1880. With the exception of Lord Trayner, who passed as an advocate in 1858, he was the senior member of the bar in Scotland.

Notes from Edinburgh.

PARLIAMENT HOUSE, 28*th February*, 1922.

THE death of Lord Dundas, which occurred on 14th February, caused painful surprise here, for, having undergone successfully a severe operation in a nursing home, he had made sufficient improvement as to stand removal back to his home, and though his condition fluctuated it had been hoped that his good constitution would pull him through. It was on 20th October last, only five days after the winter session had started, that his lordship was taken ill on the bench at the opening stage of a heavy patent case, and while it was understood that his indisposition had been brought about by worry and anxiety suffered during the illness which ended with the death of his elder brother, Mr. W. J. Dundas, W.S., the reports later were to the effect that his condition was a serious one. Mr. W. J. Dundas died in July last, and the younger brother, Lord Dundas,

survived him by only eight months, nearly four of which were spent on a bed of sickness. A strong bond of union and affection existed between the two, and each in his own professional groove had achieved great distinction. Since the year 1748 the name of Dundas has had several representatives holding legal and judicial offices in Scotland, starting with Lord President Robert Dundas of Arniston, and though of a different branch of the family, the recently deceased judge, himself the son of a former senator of the College of Justice, Lord Manor, was a worthy upholder of the traditions attaching to the name of Dundas. Called to the bar in 1878 after a brilliant school and University career at Edinburgh Academy and Oxford and Edinburgh Universities, David Dundas soon acquired a good practice in the best class of work, which might have been still more extensive but for the declinature of much business offered, as being more than he felt he could conscientiously undertake. He was thorough and painstaking in drawing pleadings, and as a pleader he was polished, fluent, and always courteous, and scrupulously fair to an opponent. As an appellate judge he became particularly critical in scrutinising the records in cases before the Second Division, and while he did not hesitate, when he thought it necessary, to adversely comment on Court of Session pleadings for which counsel were responsible, it was sometimes felt that when similarly dealing with Sheriff Court records he looked for a degree of skill on the part of provincial law agents of a higher order than the average law agent can aspire to. He was not given to exercise undue speed in getting into the swing of a case for he required to be sure in his mind that he knew, appreciated, and understood everything he thought necessary for his judicial requirements, and while often apologising for his seeming slowness of perception, he would nevertheless keep pertinaciously to his quest for information until satisfied. Careful and thorough as a counsel he was even more so as a judge, and his written opinions tell of the well-deliberated efforts of an anxious judicial mind, the opinions being couched in language betokening the application of a scholarly and legal intellect of a high order. When holding office as Solicitor-General in 1905 under Lord Advocate Scott Dickson, the late judge was raised to the bench, and after only three years' duty in the Outer House he entered into a more congenial atmosphere in the Second Division of the Inner House. The year 1905 saw no less than four judges being appointed, these being respectively Lord Johnston, now in retirement, Lord Dundas, Lord Salvesen, and Lord Mackenzie; and of the thirteen judges in office at the date of his death, Lord Dundas was the senior in actual service.

The official announcement of the appointment of Mr. T. B. Morison, K.C., to be the judge to fill the vacancy caused by the death of Lord Dundas, came as no surprise here, for his name and that of Mr. Munro composed the short leet unofficially framed by our purveyors and passers-on of gossip. Having regard to the fact that the ex-Lord Advocate had already abstained from taking the post of Junior Lord Ordinary, there was an idea abroad that on this occasion also he would not be likely to think of going on the bench on the lowest rung of the ladder, which might have meant the appointment of the Secretary for Scotland, but between the time of the last occurring vacancy and the present one Mr. Morison has suffered from a severe illness, the effects of which, doubtless, have made him consider it advisable to quit the strenuous life which must be led by a modern Lord Advocate in Scotland and in London. The last instance occurring when a Lord Advocate started his judicial career as Junior Lord Ordinary was in 1895, when Sir Charles Pearson went on the bench and commenced what became an unusually long spell of duty as the junior judge. Since his time the promotions from that position upwards to the Inner House have been more rapid. The new judge since he was admitted to the Faculty in 1891 has had a most successful career at the bar, his extensive practice having included work of all kinds, mercantile cases if anything predominating. He had the early advantage of acquiring experience in the preparation of Court business, having opportunities of learning all technical details of procedure in the office of his late father, Mr. Peter Morison, S.S.C. Well grounded in procedure and with an excellent University record in Arts and Law behind him, he soon became one of the most sought-after juniors, until in 1906 he took up senior work. As a King's Counsel his career was as pronounced a success as it had been as a junior, and latterly, as Solicitor-General, Lord Advocate, and Member of Parliament, the amount of work he had to get through in private and official capacities, put a strain on him which, though gifted with a robust constitution, on two occasions led to his health breaking down.

At the time of writing the question much discussed is as to who the new Lord Advocate is going to be, the majority of opinions favouring the chances of the Solicitor-General, Mr. C. D. Murray. The possibility of Mr. Munro coming back to his former position as Lord Advocate is, however, not left out of account, and his emoluments as Secretary for Scotland being still on the miserable scale fixed in the old days long before the war makes his continuance of an ill-paid office an act of sacrifice,

if voluntarily undertaken, or of constraint, if done under suasion. However, having in mind Mr. Murray's war services, it is highly probable that his claims for promotion will now be recognised. For the Solicitor-General's post, should Mr. Murray go higher, the first offer will, naturally, go to the Dean of Faculty, Mr. A. H. B. Constable, K.C.

The members of the Geddes Committee in dealing with the legal system in use in Scotland have done a wise thing in confessing ignorance of, or want of acquaintance with, the system which prevents their specifically condescending on the manner in which economies can possibly be effected. Such a confession is superfluous when we find it suggested that the efforts of Lord Blackburn's Committee should be directed to so increasing the Court of Session fee fund dues that the cost of keeping up that establishment, exclusive of judges' salaries and pensions, might be met. A suggestion of that sort indicates that such information as has been supplied to the Geddes Committee has not been of a well-informed nature. It has not, of course, been within the province of that Committee to map out any scheme whereby increased patronage of the Court of Session would, even without resort to increased dues, operate as a means of raising money, and, naturally, the encouragement of litigation has not been thought of. On the other hand, unconsciously, the discouragement of litigation has been foreshadowed, and without realising the true situation, the imposition of heavier charges has been hit on as being likely to operate beneficially in the interests of the Exchequer. That idea is puerile, for the position of matters will be that increased Court of Session dues will result in diverting work from that Court to the Sheriff Courts, no doubt increasing the money to be taken in the latter, but leaving the Court of Session more than ever a non-self-supporting concern. Sheriff Courts have been provided with a new tariff (as noticed elsewhere in this issue) to come into operation on an inauspicious day, 1st April next, and the increases which are shown in the new tables give an inkling of what will be the scale about to be raised in the Court of Session. Sheriff Courts are a necessity. The Court of Session is often a luxury, and soon it will be more of a luxury than hitherto. Again and again one hears it said that the feeble trickling into the Court of Session of work is explained by the prohibitive cost of printing standing as a barrier. The printing barrier does not exist in Sheriff Courts, and the increased tariff will, with the business which is going to be diverted from the Court of Session when the tariff of the latter is increased, bring more grist to the mills

operated by the lower tribunals, but at the expense of the superior one. Maybe the knowledgable persons to be appointed to explore channels of possible economies will include a leavening of practical men, and if so the abolition of a great deal of unnecessary printing in the Court of Session will be recommended as being certain to help out the scheme to increase revenue from Court dues. It stands to reason that to encourage more custom, with higher fee fund dues in force, is a sure way to get money in. People will not grudge paying more in Court dues if they get some relaxation of the printing strangle-hold.

The committee of knowledgable persons will have to devote attention to the problem of how a reduction in the judicial establishment in Scotland may be brought about. It will be easier to figure out how this country can be run without the aid of Sheriffs than to work out a scheme whereby the number of Court of Session judges can be reduced. Since this year started there have been, owing to illness and other causes, great difficulties experienced in keeping the establishment going in all departments, and with fewer judges than the present number, a worse state of matters would result. The number, thirteen, allows of judgment being given by a majority in whole Court cases, so that a reduction, if any, would necessarily mean that eleven would be the maximum of a revised bench. Taking into account criminal circuits, valuation appeal courts, and other side lines, which take several judges off their regular duties, it would be folly to think of the Court of Session being run with eleven judges, for that would mean a revival of the public outcry as to the undue delays experienced in having legal business carried through.

Queer ideas are entertained in England concerning our Scottish laws and procedure in civil and criminal cases alike, and while legal men in this country do, many of them, familiarise themselves with the systems in use in England it cannot be said that the compliment is returned, or at any rate if any attempt is made in that direction it is in a misguided fashion. At a recently held meeting in London of a *quasi*-legal sort a learned K.C., presumably after having dipped into some unreliable sources of information happily beyond the ken of mere Scots lawyers, asserted that in Scotland the verdict of "not proven" in a criminal trial has, as a sequal, a re-trial. When doubts were ventured as to the correctness of the statement he manfully stuck to his guns, and some of his deluded hearers are, no doubt, firmly convinced in their minds that this bleak and barbarous country maintains among its many savage customs the inhuman practice of torturing prisoners. Of course

the idea, belief, or whatever the propounder may call it, was based on ignorance of the subject, ignorance excusable perhaps in a layman, but not such as might be expected on the part of a King's Counsel who himself might, in the course of a criminal trial in his own country be tempted to point out to a jury, as has been done before now, the supposed advantage enjoyed in Scotland by the possibility of a middle-course verdict of "not "proven" being there returned. In Scotland the advantage, if such it can be called, sometimes represents nothing better than a cowardly loop hole resorted to by timid jurors who forget that they owe a duty to the community as well as to the prisoner. As to a re-trial of a prisoner, Scotland recognises the humane principle of holding an accused to have "tholed an assize" by undergoing one trial only, and the torturing of prisoners by putting them under the millstones of a second trial or a series of re-trials is happily unknown. The uneducated Frenchman still believes that Englishmen sell their wives in open market at Smithfield. Beliefs no less grotesque are evidently entertained in England, and by educated people too, concerning this country.

Two once familiar figures in Parliament House have been recently removed by death, in the persons of Mr. William Dunbar, M.A., LL.B., advocate, Sheriff-Substitute at Kilmarnock, and Mr. P. W. Campbell, W.S., formerly one of the Principal Clerks of Session. Sheriff Dunbar had a most notable scholastic and University career, having been dux of his school, George Watson's College, Edinburgh, and at Oxford and Edinburgh Universities he had a fine record in Arts and Law. Called to the bar in 1904, he was doing fairly well as a junior, being a sound lawyer and fluent pleader. Five years ago he went to Stornoway as Sheriff-Substitute, and last year was transferred to Ayrshire. At intervals his health gave him trouble, and at the early age of forty-four a promising career has closed.

The late Mr. P. W. Campbell was at one time a prominent figure in local political circles, having acted as election agent for Mr. Gladstone in his Midlothian campaign. In 1893 he was appointed one of the two Principal Clerks of Session in succession to the late Mr. John Martin, W.S., whose son, Mr. F. J. Martin, W.S., Mr. Campbell took into partnership in the legal business which he continued to conduct. Genial, breezy and businesslike, Mr. Campbell was well liked in Parliament House, and his advent marked a welcome change from the old type of Court official, that old type having been thirled to precedents and hampered by senility and decrepitude. When by the Clerks of Session Act, 1913, the number of Principal Clerks was reduced to one official, Mr. Campbell voluntarily retired without pension

and devoted himself to his legal business; and his extensive connection with public companies, of many of which he was a director, gave him plenty of employment. Some six months ago he was laid aside by the illness which has ended his career at the age of seventy-two.

The calling lists for February contain 105 new summonses brought into the Outer House, and of that total 41 are divorce actions. Lord Anderson has 36, and 22 of them are divorces; Lord Sands has 31, the divorces being 9; Lord Ashmore has 21, there being 7 divorces; Lord Blackburn has 10, of which 2 are divorces; and Lord Hunter (who will shortly move into the Second Division), has 7, there being 1 divorce. In the Inner House the receipts are not flourishing, for only 18 new cases were taken in during the month, 9 going to each Division, the First Division receiving 6 reclaiming notes, 1 appeal, and 2 stated cases under the Workmen's Compensation Act; and the 9 in the Second Division are made up of 2 reclaiming notes, 4 special cases, 2 remitted causes for jury trial, and 1 stated case under the Workmen's Compensation Act.

Notes from London.

THE TEMPLE, *28th February*, 1922.

MUCH of the legal interest of the month has centred round the affairs of Mr. Horatio Bottomley, M.P. Nor is the chapter by any means closed. The matter began in this way: Mr. Reuben Bigland published and scattered broadcast a pamphlet containing the most damaging allegations against Mr. Bottomley. It seemed absolutely necessary that the latter should take some action. He had Mr. Bigland arrested and brought up at Bow Street on a charge of criminal libel. After protracted proceedings and heated altercations, in which the magistrate, counsel for both sides, and, of course, Mr. Bottomley himself took vigorous part, Bigland was committed for trial at the Central Criminal Court, and also to the Shropshire Assizes, on a charge of attempting to obtain money by threats from Mr. Bottomley. At the Central Criminal Court Mr. Bottomley's counsel, after a futile attempt at the last minute to get the case adjourned, elected to offer no evidence, and Bigland was acquitted, whilst the prosecutor was ordered to pay the costs. Bigland, it ought to be noted, had justified the alleged libel—in other words, had reiterated his charges, and averred that it was in the public interest that they should be published. Mr. Justice Coleridge was the presiding

judge in London; at the Shropshire Assizes at Shrewsbury the case came before Mr. Justice Darling. An interlude between the two trials maintained and stimulated public interest. Bottomley and Bigland brought counter charges for contempt of Court, alleging the publication of matter likely to prejudice the trial. Both succeeded in so far that each was fined in varying amounts, though no costs were given to either. At the trial at Shrewsbury Mr. Bigland, in the witness-box, roundly accused the prosecutor of a series of malpractices, of which the most striking were bogus actions stage-managed by Mr. Bottomley to increase his reputation and position. Mr. Bottomley did not go into the witness-box, though he was one of the witnesses bound over at Bow Street, and the jury, after three minutes' retirement, acquitted Bigland. Next, Mr. Bottomley wrote a letter to the public prosecutor offering full information as to his dealings with Victory bonds and other matters. The public prosecutor replied by obtaining a summons against Mr. Bottomley for converting to his own use £5000 of the property of the Victory Bond Club on 16th September, 1919. The summons is to be heard on 8th March at Bow Street. Mr. Bottomley, it is announced, will conduct his own defence. He has already made a statement in the press complaining of the delay, and asserting that, if he drew the money, it was only taking that back which he had lent to the club, and there for the present the matter rests. Certainly Mr. Bottomley will be at no disadvantage in fighting his own battle. Obviously he must know the facts better than any one else, and he is well skilled, not merely in the "bookish "theoric" of the law, but in its practical application. Had circumstances permitted his call to the bar, he would certainly have enjoyed a large practice.

One more strictly legal reputation has been greatly advanced in these proceedings. Mr. Comyns Carr was counsel for Mr. Bigland throughout. He was already known as a rising man, but his skill and his success in these proceedings have decisively placed him among the first rank of members of the junior bar. He is by this time an expert in all Bottomley matters, and though it is scarcely within the bounds of probability that he can take part in the criminal proceedings against Bottomley, he can retire from this particular field with the honours and profits of victory. After all, there was not very much law in all this, so that the interest was more popular than professional. In contrast, mention may be made of a curious legal point raised by Mr. Maurice Healy, a son, it may be remarked, of the

well-known Irish politician and lawyer, at Derby Assizes on 18th February before Mr. Justice Horridge. Mr. Healy was counsel for the accused, a youth of seventeen; he claimed the right of the prisoner to be seated, and entered into an ingenious legal argument to show that, as his client was presumed to be innocent, he ought to be treated with every possible humanity and consideration. The judge retorted that he had a right to arrange the procedure of his own Court, and that he thought the prisoner ought to stand. As a matter of fact, the trial lasted four and a half hours, and, after one hour had elapsed, his lordship directed the prisoner to sit down. No case was cited during the discussion, and presumably there was none in existence. I have attended hundreds of criminal trials. Usually the judge informs the prisoner that he may sit if he desires to do so, or if he has omitted to do this, he allows it on the suggestion of prisoner's counsel; in fact, I have never known it refused. On the other hand, the judge would seem to have a right to arrange his Court as he chooses, but, then, that must be within certain limits, for the prisoner also has his rights. It is not likely that this curious point will ever be legally determined, but it may safely be left to the discretion of the judge.

A question of obviously much wider interest continues to exercise the profession and the public. Grand juries were abolished during the war, but six months after the official termination of the struggle they came into life again, and there is a contest as to whether or not they should be finally done away with. Among practising lawyers, the majority are in favour of their abolition. It is urged that no case has been brought forward in which injustice resulted from their suspension. They are undoubtedly a source of expense, delay, complexity, and confusion. Whilst they must in some cases have prevented an innocent man from undergoing the pain and ignominy of a trial before a petty jury, they must also sometimes have allowed a guilty man to escape. The coroner who "sat" on the disinterred body of Mrs. Armstrong, the wife of the Hay solicitor charged with her murder, has quoted a definite case in which it was only the verdict of the coroner's jury that prevented a miscarriage of justice. Indeed, the English system must strike an outsider as remarkably complex. A person accused of murder is in fact tried by a magistrate, by a coroner, and by a grand jury separately and apart before he is finally and decisively adjudicated upon by a judge and the ordinary petty jury. On the other hand, there is the historical prestige of the system.

Some centuries ago it was a defence of the liberty of the people against the tyranny of the Crown. In the year 1682, in the trial of James Douglas at Edinburgh, Sir George Mackenzie, the famous "Bluidy Advocate Mackenzie" of Scots legend and tradition, roundly abused the jury for acquitting the prisoner. They were worse, he protested, "than the seditious ignoramus "juries at London," referring to recent cases where the grand jury had "ignored" the bill against political offenders. There seems no danger in that direction now, and the balance of convenience is against the retention of the system. It is the English habit in legal reforms to modify rather than abolish, so it is quite possible that a bill may be introduced doing away with grand juries at other Courts than assizes. Unfortunately, in the pressure of legislation the whole thing may be overlooked for years to come. One curious point may be noticed. Many Scotsmen, perhaps even lawyers, will learn with surprise that the grand jury is not unknown to Scots law. In 1708, the year after the union with England, the old Scots law of treason, which was extremely savage, was replaced by the English practice (7 Anne, c. 21). This involved a grand jury in cases of treason. In the twenty-third volume of the State Trials there is an account of the case of Robert Watt, who in 1794 was indicted at Edinburgh for that crime. There are full details given of the procedure before the grand jury. In the result Watt was found guilty and executed, with most of the cruel details then usual in such cases. In the early years of Queen Victoria an Act for the punishment of what was named treason felony was passed, and under this proceedings have since been taken against prisoners who would formerly have been accused of the graver offence.

The resignation of Sir Forrest Fulton leaves the recordership of London vacant. The post is valuable both for its position and emoluments. It is by far the most valuable of all the English recorderships, the salary being £4000. It was raised to this respectable figure on the appointment of Sir Charles Hall, who preceded Sir Forrest in the post. This latter had formerly filled the office of Common Serjeant, and was moved upwards in 1900. The appointment is by the Crown, on the recommendation of the Court of aldermen. If precedents be followed, the present Common Serjeant, Mr. Henry Fielding Dickens, K.C., will be selected. He is the youngest son of the great novelist, and has many of his father's gifts, a sympathetic nature, a perception of the humorous, a gift of literary style. He is a hard worker, careful and painstaking, with a due sense of the responsibilities of his position.

His appointment would assuredly be highly popular, and, as it would leave another post vacant, distinguished counsel who have cast longing eyes at the recordership would no doubt be quite satisfied in the meantime with the lesser post, where the work is exactly the same, save on ceremonial occasions, though the pay is less by half. Other names than that of Mr. Dickens have, of course, been mentioned, and each has a quite satisfactory record, but here it would be improper to discuss their various merits.

The House of Lords, as the Supreme Court, has for some reason or other since the beginning of the year been largely composed of men who by birth, or birth and training, are Scotsmen. Thus Viscount Haldane, Viscount Finlay, Lord Dunedin, and Lord Shaw of Dunfermline are "unequally "yoked" with one Englishman, Lord Cave to wit. The two first were barristers, but for many reasons they have an excellent knowledge of Scots law, though its minute details cannot be so familiar to them as they are to the two noble lords above mentioned who were trained in the Parliament House. Yet their deliverances on Scottish appeals are equally satisfactory, and it must be remembered that they all sit on English and Irish appeals as well as Scots. Viscount Haldane has of late given himself up entirely to legal work and educational subjects, yet it is at any rate not impossible that the future may conceal other changes for him. He is somewhat younger than any of his distinguished fellow-countrymen who sit with him, for he is sixty-six, whilst each of the others is over seventy; he has an engaging personality, and has won distinction in various fields. Last year Lord Shaw published, in "Letters to Isabel," a very interesting autobiography. It contained some—but all too few—reminiscences of trials and legal anecdotes, carefully selected, and each one with its peculiar point. Almost inevitably it contained a good deal about phases of politics that are not of much interest to us nowadays. It was written throughout in a lively and agreeable style, whilst the central idea was ingeniously conceived and well worked out. Whatever other things Lord Shaw might or might not have been, it is quite certain that he would have made a highly successful journalist.

NOTES OF ENGLISH CASES.

THE following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report

of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

20. Acquisition of Land (Assessment of Compensation) Act, 1919, secs. 1 and 2. *Held* that the provisions of this Act did not derogate from the special provisions of a previous local Act as to the mode of assessing compensation. *Blackpool Corporation* v. *Starr Estate Company, Limited*, H.L. 8th November. 38 T.R. 79.

21. Railway—owner's risk note. Where goods are conveyed upon a route not covered by the contract the risk note does not apply and damages are due for misdelivery. *Nelson* v. *London and North-Western Railway Company*, C.A. 3rd November. 38 T.R. 75.

22. Infant apprentice—misconduct. *Held* that a master could not discharge his apprentice except for habitual criminal misconduct. *Waterman* v. *Fryer*, K.B.D. 10th November. 38 T.R. 87.

23. Trade Disputes Act, 1906, sec. 3—Conspiracy and Protection of Property Act, 1876, sec. 7—action for damages and injunction against interference with contracts of employment between miners and coalmasters. *Held* (*a*) that the action was excluded by the first-mentioned Act; (*b*) that there had been no threats of physical violence in the sense of the second Act. *Fowler* v. *Kibble*, Ch.D. 2nd November. 38 T.R. 58, affirmed, C.A. 23rd January. 38 T.R. 271.

24. Shops Act, 1912. Employees in "multiple shops" cannot be transferred on a half-holiday from one branch to another where the half-holiday is on a different day. *London County Council* v. *Wettman*, K.B.D. 4th November. 38 T.R. 67.

Appointments, Business Changes, &c.

ARGYLLSHIRE—Mr. J. B. Ballingall, advocate, has been appointed Sheriff-Substitute of Argyllshire, at Dunoon, in room of Mr. Scott Moncrieff Penney, resigned.

AYRSHIRE.—Mr. W. J. Robertson, advocate, has been appointed Sheriff-Substitute of Ayrshire, at Kilmarnock, in room of the late Mr. William Dunbar.

EDINBURGH—Mr. James Ritchie, at present clerk of the records, in the extractor's office of the Court of Session, has been appointed assistant extractor of Court, in room of Mr. D. K. B. White, retired.

Mr. William Leith, S.S.C., has been appointed depute procurator-fiscal, in room of the late Mr. Lumsden.

GLASGOW.—The practice of the late Mr. Arch. Brownlie, solicitor, has been taken over by Messrs. Fyfe & Littlejohn, solicitors. Under the arrangement for transfer, provision has been made for the name of Mr. Brownlie being associated in the conduct of the business.

KINCARDINESHIRE.—Mr. James B. Cunningham, solicitor, Stonehaven, has been appointed Sheriff Clerk of Kincardineshire, in room of the late Mr. J. C. Gardner.

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LOST PROPERTY.

A somewhat unique case, reported in our present issue,* raises a question of such far-reaching public interest that it is to be regretted that its money value was so small apparently as not to warrant its being carried to the Supreme Court for authoritative judgment. The judgment of the Sheriff is very short, and is based mainly upon the fact that the particular firm interested had a printed set of service rules, one of which directed that articles left in a cab must be handed in by the cab driver at the cab office. The Sheriff adheres no doubt to his Substitute's decision; but he does so in a manner so qualified that it is not very clear whether he supports his Substitute's pronouncement upon the general proposition, that there is a distinction between the law applicable to an article left on private property and the law applicable to an article left in a public place. This is the question in the case which is of public interest. It affects every railway or transport company carrying passengers for hire; every passenger steamship owner; every hotel-keeper and hall owner, and, indeed, the owner of any description of property upon which a member of the public may happen to be, and may happen to lay down and forget to lift any article. The Sheriff-Substitute's distinction between an article which is "lost" and an article which is merely "left" is interesting, but perhaps there may be room for some difference of opinion as to whether it is sound. In these days of much travel and much hustle the law relating to lost property assumes an importance it did not have when life was more leisurely, and people as they moved about had more time

* *Corp. of Glasgow* v. *Northcote, &c.*, 38 Sh.Ct.Rep. 76.

to see that they neither "lost" nor "left" their personal belongings. As it stands, the law in regard to the rights of the finder of lost property appears to be somewhat indefinite.

LEGAL EFFECTS OF EXCHANGE FLUCTUATIONS.

Before the war the Courts very rarely took cognisance of exchange fluctuations, for the reason that the exchanges were constant, and when the Courts made an award they did not think it necessary to consider how the position of parties might be affected by conversion into foreign currency or *vice versa*. One of the consequences of war conditions has been to revive questions as to the incidence of exchange differences, and at this juncture a review of the cases may appropriately be made.

One of the few pre-war cases was *Manners* v. *Pearson*, 1898, 1 Ch. 581, where Lord Justice Vaughan-Williams said, "It seems plain that this mode of computing the value of "foreign currency in English sterling, and thus converting "the one currency into the other, is based upon damages for "the breach of contract to deliver the commodity bargained "for at the appointed time and place, and, if this is so, it "follows that the date as at which that value must be ascer- "tained is the date of the breach, and not the date of the "judgment."

And still earlier there is the well-known passage in Lord Eldon's judgment in *Cash* v. *Kennion*, 2 Ves. 314, which was also cited by Lindley, M.R., in *Manners* v. *Pearson*, "I "cannot bring myself to doubt that, where a man agrees to "pay £100 in London upon the 1st January, he ought to have "that sum there upon that day. If he fails in that contract, "wherever the creditor sues him, the law of that country "ought to give him just as much as he would have had if the "contract had been performed."

The first point to consider is whether the claim in question is one for damages or for a liquidated debt. The majority of recent cases have dealt with claims of damages, the leading one being *Di Ferdinando* v. *Simon Smits & Co.*, 1920, 3 K.B. 409. There the defendants contracted to carry goods for the plaintiff from this country to Italy and deliver there on the 10th February, 1919, but they failed to do so, and converted the goods. The question was whether damages were payable at the rate of exchange prevailing at the date of the breach, when the rate of exchange was 31 lire to the £, or at that prevailing at the date of the judgment, when it was 62 lire to the £. Mr. Justice Roche held that the former was the

correct view, and in this he was affirmed by the Court of Appeal.

In a case which previously came before him, *Kirsch* v. *Kenyon*, 1919, W.N. 301, Mr. Justice Roche had held that the date at which conversion should be taken was the date of the judgment, but that doctrine has now been discredited. Before the Court of Appeal settled the question, Mr. Justice Bailhache, in *Barry* v. *Van den Hurk*, 1920, 2 K.B. 709, and Mr. Justice M'Cardie, in *Lebeaupin* v. *Crispin*, 1920, 2 K.B. 714, had both come to the conclusion that the proper date at which the rate of exchange should be taken was the date of breach of contract. "To hold otherwise," said Mr. Justice M'Cardie, "would produce extraordinary results. The "damages payable would depend partly on the date when the "plaintiff issued his writ, partly on the length of the inter- "locutory proceedings, partly on the illness or good health of "the parties as the trial approached, partly on the number "of prior cases which occupied the time of the Court, and "partly on whether the judge reserved his judgment or not. "They might depend also on whether judgment was entered "for the plaintiff by the judge of first instance, or by the "Court of Appeal, or by the House of Lords. Such a state "of things would, I think, be most unsatisfactory. It "would encourage the plaintiff to hasten or postpone the trial "according to his view of the money market, and he might "gamble on the rate of exchange."

Mr. Justice Avory, in *Société des Hotels du Touquet* v. *Cummings*, 152 L.T.J. 71, had to deal with a case which involved, not damages, but a liquidated debt. The facts were interesting. The defendant, an English subject, failed to pay her hotel bill of 18,035 francs in France in December, 1914, the rate of exchange being 25 francs to the £. Matters went on until 1919, when the hotel company issued a specially endorsed writ here for the amount, 18,035 francs, the English equivalent of which is £715. The defendant tendered this amount in francs in May, 1920, and the manager of the hotel acknowledged receipt, but did not give a full discharge for the amount due. The action proceeded entirely on the question whether this was a good discharge, the rate of exchange being then 50 francs to the £, or whether the debt must be paid in English money, at the rate of exchange prevailing in December, 1914. Mr. Justice Avory held that the case of a debt did not differ in this respect from the case of damages for breach, and therefore followed the rule laid down.

In all the above cases, of course, there was a fall in the

rate of exchange between the date when the debt or damages were incurred and that of the judgment. Had there been a rise in the exchange the creditor would have suffered by the decision.

In this connection, too, we may note in conclusion the decision given by Mr. Justice Russell in the case of *The British Bank for Foreign Trade* v. *The Russian Commercial and Industrial Bank*, 38 T.L.R. 65, which is of great interest and importance. The action concerned the redemption of certain bonds deposited with the defendants as security for a loan of 750,000 Russian roubles (about £78,000 sterling) in June, 1914. Repayment of the loan was impossible during the war; but when, after the signing of the Armistice, the British Bank desired to pay off the loan and recover their securities, the Russian Bank contended that the transaction was a sterling transaction, and not a rouble transaction. In the litigation which followed the House of Lords ruled that it was a rouble transaction, and the British Bank then had to obtain an order in the Court of Chancery for the delivery of the securities. In the Chancery Court the Russian Bank contended that when the loan was granted the roubles had a sterling value of about £78,000, and since the paper rouble is now practically valueless, the British Bank should pay in sterling the pre-war value of the loan. Mr. Justice Russell dismissed this contention, and held that the loan was repayable in roubles, either Imperial, Kerensky, or Soviet issue. The effect of this decision is that the defendants will only recover a very small fraction of the amount they lent, and will have to pay the costs in sterling. This undoubtedly falls hardly upon the Russian bank, but it lays down a definite principle that any fluctuation in the currency in which a lender advances is his concern, and any deficiency in the value of a security deposited by a borrower is the borrower's concern.

THE PLEADER.

During the war there were a number of decisions which, by use of such terms as "frustration of the venture" and "implied condition of capability of performance," extended very considerably the plea of impossibility as an excuse for non-performance of a contract. By a judgment just issued by the House of Lords, *Mattbey* v. *Curling*, "The Times" of 22nd March, the stricter rule of the common law appears to be replaced. To fully appreciate the effect of the case we must wait for the official report, but we make no apology for drawing earliest attention to a case of such practical importance.

Briefly the finding of the Court was that where, in a contract, other than one of personal service, there is an unrestricted covenant to perform a certain act, impossibility arising from any cause other than a statutory enactment rendering performance illegal is no excuse for non-performance. The appellant took a house on lease, covenanting to insure the premises against fire, and to yield them up at the end of the term in good repair. The premises were requisitioned by the War Office, who insisted on the lessee quitting the premises. In February, 1919, while the War Office was in possession, the premises were destroyed by fire. The lease expired on 25th March, 1919. The appellant claimed to be relieved (1) from the liability for rent for the last quarter, on the ground that he had been deprived from enjoyment by superior force; but it was held that such a defence would only hold good where the lessee was evicted by the landlord himself, or by some one having a title superior to that of the immediate lessor; (2) from the covenant to insure and to deliver up in good repair, since performance had become impossible without any fault of his own, and from circumstances against which he could not provide. It was held, following *Paradyne* v. *Jane*, Aleyne, 26, that since the impossibility did not arise from statute, it was no excuse for failure to perform the covenant.

Who has not seen the term "&c." used to conclude a specification of items in some agreement? In *Ambatielos* v. *Anton Jurgens Margarine Works*, 38 T.L.R. 294, a contract in which the well-known abbreviation occurred came before the Court. The action was for demurrage, and the clause in the charter party to be construed ran: "Should "the vessel be detained (beyond fourteen working days) by "causes over which the charterers have no control, viz., "quarantine, ice, hurricanes, blockade, clearing of the "steamer after the last cargo is taken over, &c., no demurrage "is to be charged." The steamer was, in fact, detained by a cause over which the charterers had no control, namely, a strike of dock labourers, and the charterers claimed to be exempted from demurrage under the clause set out above. Had the words in parenthesis—from "viz." to "&c."—been omitted, clearly there would have been no liability, and the question for the Court was whether these words qualified and limited the general words, and, if so, how far? The rule of law as laid down by the House of Lords in *Alexander* v. *Hansa*, 1920, A.C. 88, is that a charterer who has undertaken to load or unload within a certain number of days is answerable for the non-performance of the contract, whatever the nature

of the impediments, unless they are clearly covered by the exceptions in the charter party, or arise through the fault of the shipowner or his servants (see per Lord Wrenbury, at p. 100). In the case under consideration strikes were not expressly excepted, and unless the general words governed the whole clause, the charterer must find salvation in the "&c." Mr. Justice M'Cardie held that he was obliged to read the clause as a whole; and, further, that the word "viz." —which, it was pointed out, is not the same as *e.g.*— limited the exception to the words in brackets. This, then, threw the charterer back to the "&c." The learned judge was, no doubt, justified in acceding to the argument that "&c." is an expression so vague as to be meaningless in a commercial document—that if parties will use such indefinite words they must not expect the Courts to discover their meaning. Mr. Justice M'Cardie, however, did not stop there. He applied himself to the task of "giving a meaning to the meaningless," and, in effect, found that "&c." meant "and "other things of the same kind as those specifically men- "tioned." In other words, he applied the well-known *ejusdem generis* rule, and, applying it, held that strikes did not come within the exception.

Most large municipalities have clauses in their Acts entitling the lieges to some measure of compensation in the event of damage to their property from mobs. *E.g.* in Scotland there is the provision in the Burgh Police Act, 1892, sec. 341, which authorises the levy of an assessment to defray claims for damages sustained in consequence of "any riot or "tumult within the burgh." By an earlier Act (3 Geo. IV. cap. 33, secs. 10 and 14) assessment could only be made upon property, and in the Sheriff Court case *Scottish Plate Glass Co.* v. *Glasgow Town-Clerk*, 1899, 15 Sh.Ct.Rep. 354, it was held that to constitute a riotous assembly under that Act it was not necessary that the Riot Act should have been read; in another Sheriff Court case (*Watson* v. *Barrhead Town-Clerk*, 1912, 28 Sh.Ct.Rep. 286) it was held that a police burgh is a burgh in the sense of the last-mentioned Act even when it does not maintain a separate police force.

In this connection the recent case of *Freeman* v. *The Receiver for Metropolitan Police District*, 41 L.J. 44, is worthy of special notice. As a writer in the *Law Journal* (to which we are indebted for the following summary of the case) and the authorities has well said, it exemplifies the difference between the legal and the popular meaning of a riot. The action was brought by the plaintiff, as lessee of an unoccupied house in Vauxhall, for damages because of its

partial destruction in the peace celebrations of 28th June, 1919, the grievance being that doors had been wrenched off, windows torn out, and partitions broken down to provide fuel for bonfires, which had been lighted in the street, and which caused crowds to assemble of so formidable a character that it was impossible to interfere with them. The police of the district did not, in fact, interfere, but it was generally agreed that the crowd was a jolly and good humoured one, and that the premises had long been regarded as derelict, people helping themselves at will to wood and other articles of fuel from it. The receiver was sued under the Rent (Damages) Act, 1886, which gives a right to compensation out of the police rate of the district where a shop, house or building has been injured or destroyed " by any persons riotously and tumultu- " ously assembled together," and together with various technical defences (which appear not to have been seriously argued) he denied that persons were riotously or tumultuously assembled on the occasion referred to.

The *criteria* for a " riot " were laid down once for all by the Divisional Court, after an examination of all the authorities in *Field* v. *Metropolitan Police Receiver*, 1907, 76 L.J. K.B. 1015, where it was held that five elements were necessary—(1) A number of persons not less than three; (2) a common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another, by force, if necessary, against any persons who might oppose them in the execution of the common purpose; and (5) force or violence not merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. This decision has been applied quite recently by Mr. Justice Bailhache in the case of *Ford* v. *Receiver for Metropolitan Police*, 1921, 90 L.J., K.B. 929, where the learned judge held, under similar circumstances to those in the present case, not only that peace celebrations might constitute a legal riot, but that the police authority was not entitled to demand from a claimant proofs of the evidence on which he relied for support of his claim (being himself in a better position to obtain information on the matter than the claimant would be), and that his refusal to act until supplied with such proofs was a refusal to fix compensation for which he might be sued under the Act. In the present case, after a hearing extending over two days, Mr. Justice Shearman, while expressing his regret that he had not had the assistance of a jury, who might possibly have known better than himself what was to be expected from people in the Vauxhall district, found that " a common

" purpose existed to resist all persons who might try to stop " the crowd, and that the crowd behaved in such a manner as " to cause ordinarily and reasonably courageous persons to " keep out of the way." That constituted a riot, notwithstanding that the good-natured crowd was only out for the peace celebration, and so the receiver was ordered to pay the damages.

Those interested in the question of damages for shock consequent on fright apart from physical contact will find an elaborate review of the English, Scottish, Irish and American cases in the *Law Times Journal* of 14th January and 4th February, 1922. The author shows that only in America has the doctrine of *Victorian Railways Commissioners* v. *Coultas*, 1888, 13 App. Cas. 222, been accepted, and there only in certain states. In Scotland the doctrine of the *Coultas* case was repudiated by the Court of Session in 1910 in the case of *Gilligan* v. *Robb*, 1910, S.C. 856, in which a woman was allowed to recover for illness due to nervous shock, without impact, caused by a cow bolting from the street into the house in which the plaintiff was. And in *Brown* v. *Watson*, 1914, S.C. 44, the House of Lords, on an appeal from the Court of Session, treated the case of *Gilligan* v. *Robb* as establishing the rule in Scotland in favour of recovery for nervous shock without impact.

The present state of the law in Great Britain and Ireland as to the recovery of damages for nervous shock without impact is said by Lord Shaw of Dunfermline in *Brown* v. *Watson* to be as follows:—" But in England, in Scotland, and in Ireland " alike, the authority of *Victorian Railways Commissioners* v. " *Coultas* has been questioned, and, to speak quite frankly, " has been denied. I am humbly of opinion that the case " can no longer be treated as a decision of guiding authority " . . . I should add that other cases were cited showing " it to be fully established by authority—recent and strong " authority—that physical impact or lesion is not a necessary " element in the case of recovery of damage in ordinary causes " of tort."

Literature.

A Concise Introduction to Conveyancing. By J. A. Strahan. 2nd edition. London: Butterworth & Co. (15s. net.)

This is a student's book, and, as such, it has many merits, so many, indeed, that we are not surprised that it has reached a second edition. The nature of the demand for it may be estimated from the fact that this edition has been brought out

at this stage, notwithstanding the strong probability of the early passing of a large Conveyancing Act. Though intended for students, the book is practical rather than theoretical. For the most part it prints forms of instruments, and explains and annotates them with references to authorities. In this way it is quite possible that the book might on occasion have an informative value to practitioners in Scotland.

Training for the Public Profession of the Law: Being Bulletin No. 15 issued by the Carnegie Foundation for the Advancement of Teaching. 1921. New York.

Early in 1913 the Education Committee of the American Bar Association requested the president of the Carnegie Foundation to institute an investigation into the question of legal education in the United States. This suggestion has now borne fruit in the publication of the first part of an elaborate report embodying the result of eight years of labour by the author, Mr. Alfred Reed, and some forty collaborators; and it is presented by the Carnegie Foundation, not as a fugitive study, but as a "patient, scholarly, and serious effort to trace the develop-"ment of American legal education, and to point out certain "broad lines along which legal education and methods of "admission to the bar must develop if the profession of the law "is to fulfil its true function."

The present volume is concerned more with the past than with the present or the future; its theme is the evolution of legal education in the United States, considered in the light of the historical method; and it has been written by and for educationalists rather than lawyers. These are elements, however, which rather add to, than detract from, its value and interest. The characteristic zeal of the research student is reflected in the remarkably exhaustive statistical appendices which provide a fund of precise and up-to-date information with reference to the legal profession of America. For instance, though sex disqualifications have long since disappeared among our less conservative cousins, one learns with interest (and with much secret satisfaction) that there were only 558 women lawyers in 1910 as against 122,000 orthodox males.

There is much in this report that gives one furiously to think. No one will question that the legal profession owes a duty to organised society to strive by every means in its power towards the improvement of the administration of justice and the realisation of the ideal in the vindication of public and private rights. But he would be a bold man who would deny that the professional bodies of this country as well as of America have not contributed towards the betterment of legal education to that extent which society has the right to expect.

There are two broad types of legal education, that which is calculated to produce a jurist, and that which is calculated to produce a practising lawyer. In America, where precedent has always been glorified at the expense of principle, the latter

type predominates; and it is to the correction of this unequal emphasis that the American Bar Associations are now applying themselves. Even under their unreformed system, however, we have much to learn from their so-called "case method" of instruction, the practical training in legal dispensaries, and the many devices adopted to accustom the embryo lawyer to a forensic, as distinguished from a merely academic, atmosphere.

But what of Scotland? There are two methods of receiving "education" in law with us. One is to take a law course in one of the Universities; the other is to submit for a few months to the attentions of a professional "crammer," who is willing for the usual fee to provide the student with a conveniently compressed and readily memorised answer to all the questions he is likely to be asked. In either case, all that is expected of the student is ability to recollect ready-made propositions, and to reproduce them in reply to stereotyped forms of inquiry. Knowledge of the leading writers, even the most casual acquaintance with the law reports, are equally superfluous, provided the student can write as fast as his lecturer speaks. For what is, after all, the most difficult and delicate of a lawyer's tasks, viz., the disentangling of a vital issue from a mass of confused and partly relevant facts, absolutely no provision is made. And the finished product of this system, equipped with a parrot's memory and an honours degree, finds on first entering upon the practice of his profession that his true education has not yet begun.

Let us hope that the Carnegie Foundation will spare the blushes of our legal societies and Universities by refraining from investigating the methods of legal "education" with which we are satisfied here.

PRIVATE PROPERTY AND RIGHTS IN ENEMY COUNTRIES. By Paul F. Simonson, M.A. London: Effingham Wilson. (36s.)

The object of this scholarly treatise is to elucidate the "economic clauses" of the Peace Treaties with Germany, Austria, Hungary, Bulgaria, and Turkey, in so far as these deal with the private property, rights, and interests of the nationals of the signatory Powers. Normally these rights would fall to be regulated by the principles of international law; but, recognising the uncertainty and lack of uniformity which characterise that branch of jurisprudence, and having in view the necessity for making provision for compensating those who suffered through Germany's unconventional methods of making war, the Allies took occasion at the Versailles conference to supersede the old rules by what is virtually a fresh code of remarkable intricacy and difficulty. The magnitude of the interests affected may be imagined from the fact that the total debts due by Germans to British residents amounted early in the war to nearly £55,000,000, while the value of German property held by the British Custodian of Enemy Property was over £98,000,000.

Mr. Simonson has exhibited phenomenal skill and patience in threading his way through a wilderness of treaties, conventions, orders in council, and departmental regulations, and his book is a fund of well-ordered information upon the obscure topics of "Clearing Offices," "Mixed Arbitral Tribunals," and all the rest of the special machinery set up for the purpose of restoring the economic equilibrium. Those who are under the misfortune of having to seek recourse to that special machinery will find this work an indispensable guide to a hitherto unexplored tract of country.

The Present Law of Abuse of Legal Process. By P. H. Winfield, LL.D. Cambridge University Press. (18s. net.)

This is a step in the series of Cambridge Studies in English Legal History, and is complementary to the author's History of Conspiracy and Abuse of Legal Procedure which we reviewed recently. The present volume partakes much more of the nature of an ordinary legal text-book for practising lawyers, but hardly for Scottish lawyers. The author deals mainly with maintenance and champerty, which are not, and never were, parts of our law. In England the sale of a claim of damages is generally illegal, which it certainly is not with us, though it may well be that in many instances a purchaser would be fatally handicapped with the jury. We, of course, have the law of *dominus litis*, but that depends, not on pecuniary assistance given, but on control assumed. Also we have the rule against *pacta de quota litis*, but that is directed only against the legal profession. The English notion strikes far deeper than that, and penalises all officious interference in, or assistance towards, litigation, whether the assistance be given to plaintiff or defendant, and whether the cause assisted shall or shall not prevail, though this last point was declared in the House of Lords only so recently as 1919, and by a bare majority of three against two, and seems to be seriously qualified by the other rule, declared at the same time by the like (but differently constituted) majority, that no damages will be awarded unless special damage is shown. The fact is that this law of maintenance has its roots in remote ages when political and social conditions were very different from those of to-day, and when maintenance as practised by powerful barons amounted to "neither more nor less than chronic "organised anarchy." There are a number of other things mentioned in the book, which also obviously could never have applied to Scotland, as, for instance, the complaint by an ancient writer that "there are stepped up a new sort of people "called solicitors, who, like the grasshopper of Egypt, devour "the whole land," and one of whom is reported to have thrashed his clerk because the latter had managed to secure an order of the Court which expedited the client's business. Almost the only Scots case which is quoted is *Lamson* v. *Paragon Supply Company*, 1914, S.C. 73, in which it was

questioned whether an offence is committed in Scotland by conduct which in England would be amenable to the criminal law, as amounting to the compounding of a felony.

The Workmens' Compensation act 1906, with Notes, Rules Orders, and Regulations. By W. Addington Willis, LL.B. 20th Edition. Butterworth & Co.

That this should be the twentieth edition of this book is the strongest testimony to its practical value. It is in fact one of our indispensable reference works. Willis, along with Butterworth's cases, contain everything in workmen's compensation law. Indeed, we do not think there is any other branch in which case law is so well focussed as here. The present edition contains the decisions down to 9th July, 1921. The "war addition" statutes are, of course, included.

Cases on the Common Law. By the late Ernest Cockle and W. Nembhard Hibbert, LL.D. London: Sweet & Maxwell, Ltd. (£2 2s.)

The method of study, familiar to English lawyers, of approaching a subject through the medium of "leading cases" has never been adopted by modern Scottish writers. One realises how much we miss from an examination of such a work as this volume. By means of highly condensed but eminently lucid reports of some eight hundred important decisions, elaborately classified and annotated and provided with quotations of all the salient passages in the judges' opinions, the reader is piloted skilfully through the mazes of English "common law," and furnished at every stage, not with doctrinaire statements of theory, but with concrete applications of each principle. No pains have been spared in the use of typographical devices to make the book easy of reference and pleasant to read, and the up-to-date character of the work is evidenced by the references to cases decided so recently as last July. We heartily welcome the appearance of what will unquestionably prove to be a contribution of permanent value to the study of this subject, and an admirably equipped work of reference for the busy practitioner.

Famous Advocates and Their Speeches. By Bernard W. Kelly. London: Sweet & Maxwell, Ltd. (7s. 6d.)

In this admirable little forensic anthology Mr. Kelly has collected the "purple passages" from the speeches of over a score of the most eminent English and Irish pleaders, ranging from Lord Erskine, in the eighteenth century, to Lord Russell of Killowen, in the later nineteenth. Brief but racy biographies of each of the orators, and an interesting historical survey of "bar eloquence in England" combine to provide a highly readable and valuable addition to the lawyer's leisure library. The selections are presented by Mr. Kelly as choice contribu-

tions to an important branch of literature, and are intended for admiration, and not for imitation, by law students. For Mr. Kelly is no *laudator temporis acti*. In his view, the cause of public and private justice has gained enormously since changing tastes and altered rules of evidence have substituted sober reasoning for impassioned appeals. It is impossible to read the selections without agreeing with the editor that such brilliant and powerful addresses were calculated in many cases to produce grave miscarriages of justice. But even though the modern practitioner has neither the desire nor probably the skill "to make the worse appear the better reason," he has still the capacity to appreciate the adroit reasoning and polished periods of the old pleaders, and Mr. Kelly has rendered the profession an eminent service by making these speeches available for study in convenient form. Unhappily, Mr. Kelly has never heard of Scotland.

Obituary.

At Larkhall, on 3rd March, Mr. William Stewart M'Kenzie. Mr. M'Kenzie acted as local agent for the Board of Trade in Larkhall.

At Edinburgh, on 5th March, Mr. David Rattray Adair, of Messrs. Adair & Galloway, S.S.C. Mr. Adair was born in Glasgow in 1859, and was educated and served his apprenticeship in Arbroath. He subsequently removed to Edinburgh, and entered the office of Messrs. Mylne & Campbell, W.S. He began business on his own account in 1900, and in 1903 was joined in partnership by Mr. Robert Galloway, S.S.C. He was admitted a member of the Society of Solicitors in the Supreme Courts in 1891.

At Brechin, on 6th March, Mr. William Anderson, of Messrs. C. & W. Anderson, aged seventy-five. Mr. Anderson was J.P. procurator-fiscal for Brechin district, and local treasurer to the Forfarshire Education Authority. He is survived by a family.

At Glasgow, on 6th March, Mr. Peter Taylor Young, of Messrs. Mackay, Paterson, & Young, aged forty-four. Mr. Young, who was educated at the Kelvinside Academy and Glasgow University, was a member of a well-known legal family in Glasgow. His grandfather, Mr. Peter T. Young, was procurator-fiscal and auditor of Court in Glasgow for many years, and his father, the late Mr. George B. Young, was a partner of the firm of Messrs. Moncrieff, Warren, Paterson, & Co. Mr. Young is survived by his wife and three children.

At Edinburgh, on 7th March, Mr. Andrew Dewar, of Messrs. MacLachlan, Dewar, & Henderson, Lochgilphead. Mr. Dewar was admitted a member of the Writers to the Signet in 1892.

At Edinburgh, on 12th March, Mr. Robert Smith, senior partner of Messrs. Beveridge, Sutherland, & Smith, W.S., Leith, aged eighty. Mr. Smith was admitted a member of the Society of Solicitors in the Supreme Courts in 1879. He was the oldest member of the Leith Dock Commission, having represented the Leith Dock ratepayers since 1905.

At Irvine, on 25th March, Mr. Archibald Crawford M'Jannet, aged seventy-eight. Mr. M'Jannet was senior partner of the firm of Messrs. A. C. and A. F. M'Jannet.

At Gullane, on 30th March, Mr. James Purvis, S.S.C., Edinburgh, aged sixty. Mr. Purvis was born and educated in Haddington, and served his apprenticeship in Edinburgh. He was admitted a member of the Society of Solicitors in the Supreme Courts in 1877, and was a partner of the late firm of Messrs. Purves & Wakelin. He was solicitor and secretary to the Scottish Licensed Trade Defence Association, and was a recognised authority on Scottish licensing law.

Notes from Edinburgh.

Parliament House, 31*st March*, 1922.

The winter session was a veritable die-hard, the two weeks which have intervened between 18th, the official closing day, and now having witnessed quite a lot of business going on within our walls, and some of it very profitable business, too. The protracted trial by jury before Lord Ashmore of the series of actions arising out of the Skelmorlie charabanc upset was the most formidable item, while Lord Anderson, sitting with a nautical assessor, heard evidence in the actions over the sinking of the screw steamer "Rowan" in St. George's Channel; Lord Blackburn also had a proof, and Lord Sands a hearing on evidence. There were also three other jury trials at the start of the vacation; and to finish off there has just been concluded the taking of evidence by the representatives of the Ministry of Transport at the public inquiry into what is known in Edinburgh as the battle of the poles, which battle has been and will continue to be a matter of vast importance in the capital, whose citizens are divided into hostile camps, the one lot being polarists and the other anti-polarists.

The inquiry mentioned lasted three full days, the hour of rising being later than our legal tribunals are used to, and four days ought really to have been occupied, with the hour of rising fixed at 4 p.m. according to our custom. The use of the spacious Second Division Court-room had been given for the conduct of the inquiry, and seldom has that Court-room seen such a crowded audience or such a blaze of colour. The various

colours of ladies' costumes were subdued in comparison with the mammoth map slung up to the gallery, which map was a triumph of the paint-mixer's art. Though the Edinburgh Corporation was one of the parties to the dispute, the Court proceedings were taken in hand by Town officials, and, in addition to having the services of our police and attendants, the Town provided a number of beautifully and expensively dressed individuals to act as ushers. One of the outstanding features of the proceedings was the imposing array of dazzling white starched shirts worn by those ushers, which, looking to the high charges of laundries just now, seemed to be a flaunting of municipal extravagance, especially as in the Law Courts, since 1914, the soft white shirt has been more in evidence than the starched article. Out of respect for the tribunal, counsel wore their wigs and gowns, and this gave a judicial aspect to the proceedings which would be duly appreciated by the onlookers. Mr. T. G. Robertson, who represented the Corporation (the members whereof in the majority are central polarists), had the unusual experience of having to cross-examine a Court of Session judge, and in that judge's own Court-room too, Lord Salvesen having appeared in the rôle of witness on the side of the anti-polar section. Another prominent witness for the anti-polarists was Lord Johnston, who, being now on the retired list, has time to devote himself to many interests, among which the affairs of the Cockburn Association are included. That Association has done much in the past to preserve the fair face of the capital, and a good fight has in the present instance been put up to guard the beauty of Princes Street when the new tramway system is introduced. In the course of his evidence Lord Johnston mentioned that he had been born in that beautiful street, and naturally his sentimental regard for its amenity is strong. There used to be a very filthy loch known as the Nor' Loch down in Princes Street Gardens, which less than a century ago had become little better than a swamp, and when it was proposed to replace the swamp lands by North British Railway lines the indignation in the capital was terrible. History is repeating itself.

Mr. Fred Macquisten, K.C., M.P., is a member of the Scottish bar, and also has had the advantage of coming through the mill as a solicitor in Glasgow, and his words are deserving of great respect when he gives to the public in the press some of his ideas concerning the subject of printing in the Court of Session. His expressed views mainly concern the suggested introduction of a certain method of reproducing typewriting to replace the extravagant printing methods in

use in the Supreme Courts, and if the system he mentions be all that he claims for it, it is surely within his own power as a Member of Parliament to have attention drawn to its excellence in the proper quarter, which is not in Scotland, or in Edinburgh, but in London. His advocacy does but touch on the fringe of a serious matter, which is the whole question of compulsory printing in the Supreme Courts. Space forbids going into that matter here save to point out that in bygone days printing in most instances was much cheaper than type- or hand-writing, and when more than three copies of a document were required, the auditor allowed printing charges only, as being the cheapest mode of reproduction. Times have changed, and if Mr. Macquisten agitates in Parliament, an inquiry, if ordered, would not find evidence lacking to support a complete overhaul of the whole system of printing in the Court of Session. It may be further pointed out that an agent's personal liability for a printing account is a much more onerous obligation than his willingness to have copying work done by his own office staff.

The appointments of Lord Advocate and Solicitor-General respectively turned out to be according to the expectations of most people here, the selection of Mr. Murray having been favoured as a certainty with Mr. Constable having the offer of the Solicitor-General's post, which offer he has accepted. For fully a week after it had become something very like common knowledge that the Dean of Faculty was going to be the new Solicitor-General there was an unaccountable delay in publishing the official notice, and an idea got abroad that there had been some hitch due to political considerations, for Mr. Constable has not a seat in Parliament, and will not easily succeed in getting one; but, whatever the hitch might have been, the want of a seat could have had nothing to do with it, for in the past it has been no uncommon thing for a Solicitor-General to carry on without being a Member of Parliament, the only drawback about this being that the Lord Advocate has more responsibility thrown on his shoulders than he would have if his second in command were available in the House of Commons to relieve him at times.

Having in mind the recommendation made recently in the Geddes Report that the possibility of reducing the Scottish judicial establishment should be considered by a committee to be appointed, there may be some excuse for the Hon. A. Shaw, M.P., putting a question to the Secretary for Scotland as to whether it was necessary just now to fill up the vacancy recently existing in the bench of the Court of Session. It is common

knowledge that business here is not in a flourishing condition, and yet, when it was recently found necessary, with a full complement of judges, to have an Act of Sederunt passed in contemplation of extended sittings of the Second Division, also for Lord Anderson to sit several days in vacation taking a proof, for Lord Blackburn to sit in vacation also for a proof, and for Lord Sands to do likewise for a hearing on evidence—things like that would suggest that if the Court is overstaffed for present requirements, then there must be some bad management as to the distribution of work. If the session is not long enough for everybody's requirements, the natural explanation would rather seem to be that even just now the bench is not overstaffed.

The sittings for jury trials ran a curious course at the start of the vacation, for, while the Inner House judges engaged, being three in number, had one trial each to their credit, and disposed of the trials in one day each, Lord Ashmore, who had been called in to assist at the sittings, was occupied during seven days at the trial of the 19 claims presented before the one jury, the claims arising out of the Skelmorlie mishap, the result being that awards amounting in all to £3640 were given by the jury. The other three trials were taken respectively by the Lord President, Lord Salvesen, and Lord Ormidale, and in two of them the pursuers got verdicts. The Lord President's case was one of a class which has been little in evidence for many years, though once pretty common, viz., accident to a foot-passenger through a defective pavement grating, and the injured person, a lady of the Gallowgate region, got £50 damages against Glasgow Corporation. The humble push-bicycle has come back once more into the world of jury trial, for the case tried by Lord Salvesen concerned a yelping dog and a cyclist who was spilled with serious injuries, and he got £215 awarded against a Ross-shire fisherman, the owner of the dog. The remaining case, that taken by Lord Ormidale, was more up to date, arising, as it did, out of a foot-passenger in Leith Walk being injured by a motor vehicle, and the defenders got the verdict here.

For the period of less than three weeks the number of new cases received in the Outer House is very satisfactory, the total being 94, and less than a third represent divorce actions, the total of these being 30. Lord Anderson heads the list with 34, of which 14 are divorces; Lord Ashmore follows with 23, there being 4 divorces; Lord Sands has 22, with 10 divorces; Lord Blackburn has 9, there being 1 divorce; and Lord Morison has 6, with 1 divorce.

In the Inner House for the same period the new arrivals amount to 15 cases, the First Division receiving 11 and the Second Division 4. The 11 in the First Division consist of 6 reclaiming notes, 2 appeals, 2 special cases, and 1 Exchequer appeal. The 4 in the other Division are composed of 1 reclaiming note, 2 special cases, and 1 remitted cause for jury trial.

Notes from London.

THE TEMPLE, 31*st March*, 1922.

THERE is little difficulty in fixing on the chief matters of interest in the legal world that have occurred during the month of March. They are the retirement of Lord Trevethin from the chief justiceship of England; the appointment of Sir Gordon Hewart, late Attorney-General, to the vacant position; the promotion of Sir Ernest Pollock, the late Solicitor-General, and colleague of Sir Gordon Hewart, to the latter's vacant position as Attorney-General; and the appointment of Mr. Leslie Scott, K.C., as the new Solicitor-General. It is less than a year ago since Mr. Justice A. T. Lawrence was unexpectedly made Lord Chief Justice upon the vacancy created by the acceptance of the Indian viceroyship by Lord Reading. At that time the person expected to succeed to the chief justiceship was Sir Gordon Hewart, who was then Attorney-General. But the political situation interfered with this general expectation. Sir Gordon Hewart's political services were required by the Government, and he consented temporarily, it was understood, to forego his claims upon the chief justiceship. When the installation of Lord Trevethin took place Sir Gordon Hewart welcomed the new Chief Justice, and Lord Trevethin, in his acknowledgment, remarked that, instead of Sir Gordon being the welcomer, he would, in the ordinary course of things, have been the welcomed. At that time Lord Trevethin was seventy-eight, and he dropped the hint that his term of office would not be of long duration. That forecast has proved to have been correct; but it is generally felt that Lord Trevethin's retirement has been hastened by political considerations, at a time when Sir Gordon Hewart's prospects were uncertain through the general uncertainty of the political situation. It appears that so long ago as last December Lord Trevethin sent in his resignation, but he was then desired by the Government to hold it over in the meantime. It was during this interval that politics became overcast, and the prospects of the present Premier of returning to power uncertain if there should be a general election. Sir Gordon Hewart's

anxiety was intelligible. Whether Conservatives or Liberals won the elections, the new Government would have had other candidates for promotion to the chief justiceship than Sir Gordon Hewart. In these circumstances, Lord Trevethin is said to have received a sudden intimation that his resignation of December was accepted, and, in consequence, to have been taken entirely by surprise. He was actually in the midst of trying a case when the intimation came, and had made arrangements for the trial of other cases as if he were still holding his office indefinitely, and expected nothing less than the sudden acceptance of his resignation. Sir Gordon Hewart had at length claimed his release from politics, and was ready now to enter on the dignity of the chief justiceship, and was not contemplating with pleasure his return to the bar. To be sure, the Attorney-General who goes back to the bar, as Sir John Simon did, for example, may always make a large income from private practice, but it would hardly be more than what Sir Gordon Hewart received in fees as Attorney-General during the year 1920-1921. According to the latest returns of grants by Parliament for the various Government Departments, there was paid to him in that year as fees the sum of £27,990 9s. 7d. Sir Ernest Pollock, who has succeeded him as Attorney-General, will in future receive fees on the same generous scale. While Solicitor-General Sir Ernest received in fees, during the same year 1920-1921, the sum of £12,928 15s. 6d.

At the swearing-in ceremony the Lord Chancellor referred, in addressing Sir Ernest Pollock, the new Attorney-General, to the fact that Sir Gordon Hewart and the Lord Chancellor had long been associated, and that whilst he was Attorney-General Sir Gordon was Solicitor-General. Lord Birkenhead also referred to Sir Gordon becoming at the early age of fifty-two the occupier of the most distinguished permanent judicial position in the country. It must have been rare in the history of the legal profession that a Lord Chancellor at the age of fifty could have thus referred to the accession of a Lord Chief Justice only two years older than himself. The two men have been associated in law and in politics in a very unusual way. They are both lawyers who have been brilliant politicians, but though belonging to different political parties, they have yet, by a curious fortune, served together in the same Government, Lord Birkenhead as Attorney-General and Sir Gordon Hewart as Solicitor-General. According to the Lord Chancellor, they knew each other as the horse and its rider are said to know each other's secrets. The facts about Sir Gordon Hewart are familiar, and have so recently been mentioned in this Review

that it is sufficient to quote from Lord Birkenhead's speech at the swearing-in ceremony, "The aggregation of those qualities "of his will furnish the annals of the Lord Chief Justices of "England, brilliant as those have been, with an ornament not "unworthy of the greatest of those who have preceded him." This is what the bar generally expect from the new Lord Chief Justice's tenure of office.

Sir Ernest Pollock had been Solicitor-General for three years when he succeeded Sir Gordon Hewart as Attorney-General. But he has not "arrived" so early in life as Sir Gordon Hewart, he being in his sixty-first year. He belongs to that famous family of lawyers, the Pollocks, who have given so many eminent judges and jurists to illustrate the annals of the law. It was almost in the ordinary course of things that Sir Ernest Pollock should have attained the position he now occupies. His career in Parliament, and the place he occupied as an advocate in the Courts, made him Solicitor-General, and he was the natural successor to Sir Gordon Hewart. No one really doubted that he would be the new Attorney-General, though there had been rumours that some other promotion, judicial or political, would be found for him when the resignation of Lord Trevethin should take place and Sir Gordon Hewart become Chief Justice.

Mr. Leslie Scott, the new Solicitor-General, has been for a considerable time one of the leading mercantile and commercial lawyers at the bar, and one of the most occupied and busy of politicians; so that whether he should receive his reward through politics or by promotion to the bench was a moot point. He had claims on both worlds. He had been offered a judgeship, it is said, but had refused it, and he succeeded at length in making the powers that be understand that he had larger views of what was due to him than could be satisfied by a puisne judgeship. His wide range of knowledge, especially of international law and of the financial and industrial questions with which Governments are so much occupied in these days, will make him an exceedingly helpful colleague of the new Attorney-General.

The interesting question as to whether Sir Ernest Pollock, as Attorney-General, should be appointed a member of the Cabinet has been raised. The Attorney-General has no claim, by virtue of his office, to be made a Cabinet Minister on his appointment. It happens that he exercises a number of judicial or semi-judicial duties under various statutes. It has often been argued, for this reason, that the precedents of

Lord Reading and Sir Gordon Hewart being taken into the Cabinet constituted breaches of the well-known constitutional principle as to the separation of the executive and the judicial functions. The Attorney-General has often to decide, for example, whether criminal prosecutions shall be undertaken or whether they shall be withdrawn; and the contention is that his discretion should be free, and not suspected of being influenced by his position as a member of the Executive and by the political aims or exigencies of the Government. Whether the danger to the liberties of the subject and the encroachments on the functions of the judicial bench are in these days as serious as some people imagine, or are materially increased by the entrance of the Attorney-General into the Cabinet, are more or less doubtful propositions. In the cases of Lord Reading and Sir Gordon Hewart, it was the practical desirability of utilising their abilities, and having direct access to their knowledge in Cabinet Councils, that led to their introduction into the Cabinet. This consideration will no doubt determine for the future whether the Attorney-General shall be a Cabinet Minister or whether, as Sir Frank Lockwood said years ago, he shall be sent to play outside while the Cabinet sits deliberating.

While these changes have been going on upon the bench, others have been taking place at the bar, and fifteen new King's Counsel have been created and called within the bar. During the last three years eighty-three King's Counsel have been created, and thus the balance has been redressed of those years of the war when only three or four creations of "silks" took place. There is not probably any name well known to Scottish readers in this newest list of K.C.'s. Most of them are well-established juniors of middle age and of an ordinary type who, after a due number of years, naturally receive silk. Only one name, perhaps, calls for some notice. Mr. W. A. Jowitt is the youngest of these silks. He is only thirty-six years of age, and has been called no more than twelve years. Lord Alverstone, in his "Recollections of Bar and Bench," relates that he was called within the bar less than ten years from the date of his call, and that up to that time no junior had ever taken silk after so short an interval. Mr. Jowitt has not quite so remarkable a record. From Mr. Jowitt's brilliant success at the junior bar it may be anticipated that his career as a silk will be equally distinguished.

By the retirement of Sir Forrest Fulton from the recordership of London, one of the most famous and historical of

judicial offices became vacant. Sir Forrest Fulton was made Recorder in 1900, having previously been Common Sergeant. The Recorder is the judge who, with the Common Sergeant, sits at the Central Criminal Court and tries the less important offences which are tried there, the others being reserved for the High Court judge, who is appointed to sit there at each of the sessions. The Recorder is also the presiding judge at the Lord Mayor's Court, which is the ancient Court of the City of London in civil cases. For the most part, however, the Recorder is occupied with his duties in criminal cases, and the Common Sergeant usually sits in the Lord Mayor's Court. Sir Forrest Fulton was appointed Common Sergeant thirty years ago. At that time he was forty-six years of age, and his practice was almost wholly in the criminal Courts, the Old Bailey and the Middlesex Sessions. He had sat in Parliament, but was defeated in the very year, 1892, in which he was appointed Common Sergeant. In those days he was a tall, handsome, and very "dressy" person, with good political connections and much popularity in the City circles that are influential in making nominations and appointments to City posts. In the farewell speech which he made on his retirement he said that he was glad to retire, as he had become weary of sentencing his fellow-creatures. That struck me as rather odd, as only a few days before I had heard a conversation in which several members of the bar practising at the Old Bailey and the sessions had agreed that Sir Forrest Fulton's sentences were rather noticeably severe, and the observation was made that at his age of seventy-six a judge was more likely to be severe in his sentences than he would have been in his earlier days.

There were several candidates for the vacancy left by Sir Forrest Fulton. I do not know whether the Common Sergeant was a candidate for the post, but at any rate there was a feeling that Mr. Henry Fielding Dickens, K.C., one of the sons of Charles Dickens, who has been Common Sergeant since 1918, would be the most suitable successor to Sir Forrest Fulton. Mr. Dickens, however, has not been appointed, but Sir Ernest Wild, K.C., M.P., who has been one of the leading advocates in the Courts since his famous defence in the Peasenhall murder trial in 1902-1903, when he succeeded in inducing two different juries to disagree, the result being that the Crown entered a *nulle prosequi*, and the accused was not put on his trial again.

Sir Edward Marshall Hall, K.C., was also, it was under-

stood, a candidate for the recordership, and it is hardly necessary to say that he is perhaps the most distinguished advocate in the criminal Courts. Sir Ernest Wild was his chief competitor there, and in a certain kind of *cause célebrè* in the civil Courts. The recordership was an ideal post for either of the two rivals. The salary is £4000 a year, and however successful an advocate may be in the Criminal Courts, it is hard to make that amount in fees. Sir Ernest Wild has literary tastes, and has made a sort of literary reputation. By numerous articles, and such publications as "Lectures on Spenser's "Faerie Queen," and a volume of poems called "The Lamp of "Destiny," he has challenged attention to the fact that he is a votary of the Muses, and not merely, what the general public might suppose him to be, a man of the world, a fashionable advocate, and a politician conspicuous in the social life of Parliamentary circles.

NOTES OF ENGLISH CASES.

THE following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

25. Increase of Rent, &c. (Restrictions), Act, 1920, sec. 2 (6), 12. A County Court judge has no jurisdiction to decide the abstract question "what is the standard rent?" He can only decide questions of increase. *Broomhall* v. *Property Agents and Owners, Limited*, K.B.D. 9th November. 38 T.R. 56.

NOTE.—In Scots law the Sheriff would have power to entertain a declarator of the standard rent (Sheriff Courts Act, 1907, sec. 4).

26. Marine insurance—war risk or marine risk. A steamship carrying ambulance wagons for war purposes collided with a steamship, under requisition, going for orders. Both were at full speed without lights under orders. *Held* a war risk. *P. & O. Branch Service* v. *Commonwealth Shipping Representative*, K.B.D. 11th November. 38 T.R. 93. Affirmed C.A. 7th March. 38 T.R. 433.

27. Constitutional law—British North American Act, 1867, secs. 91 and 101. It was *ultra vires* of the Dominion Parliament to pass the "Combines and Fair Prices Act, 1919." This is exclusively within the powers of the provincial legislatures. *Attorney-General of Canada* v. *Attorney-General of Alberta and other Provinces*, P.C. 11th November. 38 T.R. 90.

28. Marine reinsurance. A policy on oil in barrels contained the words "to pay average including the risk of leakage," &c. *Held* that this covered leakage from any cause, as sea risk of leakage was covered without stipulation. *Traders Insurance Association, Limited* v. *Bankers Insurance Company, Limited*, K.B.D. 14th November. 38 T.R. 94.

29. *Force majeure*—owing to a trade union dispute the Council were prevented from supplying electricity to a work. The finding of the magistrate was "the result of doing the work would probably have been a general stoppage." *Held* that this did not amount to *force majeure*. *Hackney Borough Council* v. *Dore* K.B.D. 14th November. 38 T.R. 93.

30. Sale of Goods Act, 1893, secs. 7 and 13—sale of "the cargo of maize shipped per s.s. 'Rijn' consisting of about 2813 French tons per bill of lading"—the captain secretly shipped 58 tons of tobacco in addition. On learning this at discharge the buyers rejected. *Held* that the contract had been implemented. *Paul* v. *Pim*, K.B.D. 15th November. 38 T.R. 95.

31. Rescission of contract—fraud. *Held* on the evidence that there had been no fraudulent misrepresentations, as distinguished from "puffing" advertisements and rescission refused. *Thomas* v. *March*, C.A. 15th November.

32. Power of Corporation to trade—Electricity (Supply) Act, 1919, sec. 23. *Held* on the construction of their local Act and of above Act that Liverpool Corporation was entitled to manufacture and sell electric light fittings. *Attorney-General* v. *Liverpool Corporation*, Ch.D. 17th November. 38 T.R. 101.

33. Increase of Rent, &c. (Restrictions), Act, 1920, sec. 13. *Held* that premises sub-let to a hotel company for sleeping accommodation for their waiters were protected by the Act as a dwelling-house. *Duke of Rickmond* v. *Cadogan Hotel Company, Limited*, K.B.D. 17th November. 38 T.R. 151.

34. Increase of Rent, &c. (Restrictions), Act, 1920—standard rent. The lease stipulated for "an additional rent of 2s. a week as the tenant's contribution towards the expenses of the housekeeper for cleaning the premises, such additional rent to be recoverable by distress." *Held* that this sum was part of the standard rent in estimating increase of rent. *Woods & Co., Limited* v. *City and West-end Properties, Limited*, K.B.D. 18th November. 38 T.R. 98.

35. Unemployment Act, 1920, first schedule, part 2. Hunt servants, gamekeepers, greyhound trainers, river-keepers, golf club greenkeepers, and dairymaids are exempt. *Minister of Labour* v. *Master of Hampshire Foxhounds*, K.B.D. 22nd November. 38 T.R. 113.

36. Interest on open accounts—3 & 4 Wm. IV. cap 42. A demand for interest must be made in writing. A demand in the statement of claim served with the writ is not sufficient. *Boston, &c., Company, Limited v. Grimsby, &c., Company Limited*, K.B.D. 22nd November.

Note.—The Act does not apply to Scotland. Interest runs at common law after written notice. Bell's Principles, sec. 32 (K.).

37. Income Tax Act, 1842, sec. 61, schedule A, No 6—hospitals and almshouses. A net assessment of £358 being the annual value of the houses occupied by officials having an annual salary of £150 or more was sustained. *Governors of Sutton's Hospital in Charter House* v. *Elliott Inspector of Taxes*, K.B.D. 23rd November. 38 T.R. 129.

38. Validity of provincial death duties in Canada—British North America Act, 1867, sec. 92. (*a*) *Held ultra vires* of the

Province of Quebec to levy succession duty on property outside the province, following *Cotton* v. *The King*, P.C. (1913) No. 377, vol. xxix., 30 T.R. 71; (*b*) amending legislation having been passed, *held* now competent to do so. (*a*) *Burland* v. *The King;* (*b*) *Sharpel* v. *The King*, P.C. 25th November, 38 T.R. 131.

39. Railway passengers' hand-luggage—notice on ticket—French law. Plaintiffs entrusted hand-luggage to a train attendant while they went to the dining car. It was stolen. *Held* that defendants were protected, *inter alia*, by the notice on the ticket. *Buchanan* v. *Compagnie Internationale des Wagons Lits*, K.B.D. 25th November.

40. Nationality of Englishwoman married to German between Armistice and Treaty of Peace—British Nationality and Status of Aliens Act, 1914, sec. 10. *Held* that she was a German, and that her property was subject to the charge in the Treaty of Peace Order, 1919, sec. 1 (xvi.). *Fasbender* v. *Attorney-General*, Ch.D. 24th November. 38 T.R. 114.

41. Will—delusions. Will sustained because testatrix, although suffering from delusions, was not influenced by them in the subject-matter of the will. *In re Williams-Jillings* v. *Bell*, C.A. 28th November.

42. Gaming Act, 1835, sec. 2—Gaming Act, 1845, sec. 18—Gaming Act, 1892, sec. 1. The Acts of 1845 and 1892 do not destroy the effect of the Act of 1835. *Cohen* v. *Hall*, K.B.D. 29th November. 38 T.R. 150. Affirmed C.A. 3rd March. 38 T.R. 429.

43. Reprisals Order in Council, 1915. A Swedish ship from Sweden to U.S.A. landed mail bags at Kirkwall for examination. They were partly destroyed by fire *en route* for London to be examined. *Held* (*a*) that the Crown was not bound to insure against fire; (*b*) that in the absence of negligence the Crown was not liable for the loss of neutral goods in the mail bags. *Topken Company* v. *H.M. Procurator-General*, P.C. 6th December.

44. Hire purchase. Injuction by owners to restrain hirers from describing themselves as owners in registering motor lorries with County Council. Injunction refused as it was done to comply with County Council rules. *British Railway Traffic and Electric Co., Ltd.* v. *C.R.C. Co., Ltd., and London County Council*, K.B.D. 7th December. 38 T.R. 190.

45. Reparation—loan of defective article. A trapeze performer, who provided her own equipment, borrowed a rope from the defendants which broke. *Held* that as the defendants were ignorant of its defect they were not liable. *Hunt* v. *Nelson*, K.B.D. 7th December.

46. Trade Union Act, 1871, sec. 4—irregular ballot. (*a*) The Court had jurisdiction; (*b*) a ballot as to increasing the annual levy was irregular because (1) the wrong scrutineers had acted; (2) the numbers of the members had been put upon their ballot papers which gave means of identification. *Brodie* v. *Bevan (National Society of Operative Printers)*, Ch.D. 9th December. 38 T.R. 172.

47. Criminal Law—evidence. In a trial for causing abortion by drugs it is relevant to prove the use of instruments by the accused in other cases. *Rex* v. *Starkie*, C.C.A. 12th December. 38 T.R. 181.

48. Railway — personal luggage. A violincello carried by a musician for professional use is not personal or ordinary luggage.

Great Western Railway Co. v. *Evans*, K.B.D. 12th December. 38 T.R. 166.

49. Prize. Small sea-craft were carried on rail by the Germans in South-West Africa, far inland, to avoid capture. They were taken by military forces after an interval of six months. *Held* that they were not good prize. The Roumanian (1916). 32 T.R. 98, 1 A.C. 124, distinguished. *H.M. Procurator General* v. *Woerman Tinie Actien Gesellschaft*, P.C. 13th December. 38 T.R. 183.

50. Trade Union Acts, 1871, sec. 5 (3), and 1913, sec. 1 (2) and 2 (1)—Copyright Act, 1911. Copyright in songs. *Held (a)* that an Incorporated Company could be a trade union; *(b)* that the plaintiffs were not a trade union; *(c)* that as equitable assignees they had a title to sue; *(d)* that the defendants had infringed their copyright. Injunction granted. *Performing Right Society, Limited* v. *London Theatre of Varieties, Limited.* K.B.D. 14th December. 38 T.R. 184. *Cf. Performing Right Society, Limited* v. *Edinburgh Corporation*, 1922. S.L.T. 28.

Appointments, Business Changes, &c.

Edinburgh.—Mr. Charles D. Murray, C.M.G., K.C., M.P., has been appointed Lord Advocate in succession to the Right Hon. T. B. Morison, K.C., now Lord Morison.

Mr. Andrew Henderson Briggs Constable, K.C., Dean of the Faculty of Advocates, has been appointed Solicitor-General in succession to Mr. C. D. Murray.

Glasgow.—An amalgamation has taken place between the legal firms of Messrs. Aiken, Harvie Anderson, & Co., and Messrs. Fyfe & Littlejohn. The new firm will carry on business at 201 West George Street, under the name of Anderson, Fyfe, Littlejohn, & Co. The senior partner is Mr. T. A. Harvie Anderson, and the other partners are Mr. A. Peden Fyfe, Mr. William D. Littlejohn, and Mr. G. H. R. Laird.

Paisley.—Mr. T. D. Laird has been appointed procurator-fiscal for Paisley.

Society of Writers to the Signet.—The following have been admitted members of the Society of Writers to the Signet:—Alastair Henry Crerar, Christopher Richardson M'Vittie, Ian Coshieville Menzies, and Kenneth Morton Oliphant.

Society of Procurators of Midlothian.—The following report by the council was submitted at a special general meeting of the society held on 3rd March:—Since the last meeting of the society, held on 28th October, 1921, the council have dealt with the matters undernoted.

Affiliation Cases in England.—The question under consideration was whether a mother resident in Scotland is entitled to sue a man resident in England for ailiment of an illegitimate child without the necessity of her going to reside for a period in the man's domicile. There is no doubt it is quite competent for a mother to sue as above mentioned, and the authority is the Summary Jurisdiction (Process) Act, 1881, 44 and 45 Vict. cap. 24, sec. 6.

Remuneration of Agents for the Poor.—This question, which was raised by the Society of Procurators of Forfarshire, was placed by your council before five members of Parliament for Edinburgh, and one of the members of Parliament for Midlothian, and we have received sympathetic replies from them all. Mr. Graham, M.P. for Central Edinburgh, who has specially interested himself in the subject, approached the Secretary for Scotland—unfortunately without receiving a promise of legislation. Later, Mr. Graham put a question in the House of Commons. The Secretary for Scotland in a written reply stated that he was not prepared to introduce legislation to provide a remedy.

Late Stamping of Deeds.—The council approached the Board of Inland Revenue and asked them to arrange that the question of penalty for late stamping or insufficient stamping of deeds, should be dealt with in Edinburgh and not in London. The Board of Inland Revenue have replied stating that they do not see their way to alter the existing practice.

Sheriff Court Table of Fees.—On the question of revision of these fees, your president and secretary attended upon the Sheriff-Principal recently, and explained to him the grievance that at present exists with regard to the expense of founding jurisdiction in Small Debt cases not being recoverable from the debtor. The Sheriff took a sympathetic view of the matter, but stated that, in his opinion, a special clause in the Table of Fees would be necessary to remove the grievance, and he promised to mention the matter to the Lord President, which he did. Your council is keeping in view, along with the Society of Procurators in Glasgow, to have a clause inserted in the proposed new Table of Fees in the Sheriff Court which will remove the grievance.

Sheriff Court Dues.—At first your council decided that they should not make any representation to Lord Blackburn's committee on this matter, but later they considered the proposed increases very carefully and made several suggestions to Lord Blackburn's committee, some of which were adopted by the Committee in their report. The new Table of Dues has been issued and comes into force on 1st April.

Stipendiary Magistrates.—Your council are of opinion that a stipendiary magistrate for Edinburgh should be appointed, and wrote to the town-clerk, before his report on the subject was issued, so informing him and offering to send a deputation to give their views. The town-clerk submitted his report without hearing a deputation, but the Lord Provost's committee has delayed consideration of the matter until they hear deputations from this society and from the Howard Society for Penal Reform.

Criminal Appeal Courts.—Your council have deferred consideration of this matter in the meantime.

Wills of Court of Session Summonses.—The question of reform herein was remitted to your council at the last meeting of the society, but your council have decided to do nothing in the matter, mainly on the ground that the objects of this society are generally confined to Sheriff Court practice.

Presiding Officers' Fees at Elections.—At the last meeting of the society it was remitted to the council to endeavour to get an increase in these fees in Parliamentary elections. The council laid before the Secretary for Scotland a full history with regard to these fees, and he has replied saying that he does not consider that the

fees are inadequate. He says, however, that in the event of any general revision of the Scale of Fees for Parliamentary elections, the representation by the society will be kept in mind.

Legal Education: Law Agents' Examinations.—A memorial for reform was presented by several legal societies, including this society, and the Lord President has replied stating that after consultation with the examiners, it is thought better to delay action until the new regulations of the Scotch Education Department relative to leaving certificates and the new regulations for the Universities' entrance examination are issued.

Fees in Sasine Office.—Your council at present have this matter under consideration and will be glad to have suggestions as to the method to be pursued whereby these abnormal increases could be removed.

Printing of Papers in the Court of Session.—Your council have recently been requested to consider reform herein with a view to saving expense, and have carefully considered the claims of a new method of reproducing copies which, in their opinion, is deserving of the attention of members of the legal profession.

Amendment of the Law of Diligence.—The society, in conjunction with many other legal societies, are parties to a memorial which is at present before the Secretary for Scotland, which memorial asks that a committee be appointed to consider the whole question of trouble and expense arising out of the scarcity of Messengers-at-Arms and Sheriff Officers, particularly in the remote parts of Scotland.

Printing in Sheriff Court Appeals to Court of Session.—The council report with pleasure that their efforts for reform of procedure have met with success. An Act of Sederunt was passed in November last giving effect to the suggestions contained in the memorial which was framed by your council. The printing of notes of evidence need not now be undertaken, and prints lodged within fourteen days after the process is received in Edinburgh, but, similar to Appendices to reclaiming notes, the evidence or proof can be printed and lodged at any time prior to the case being heard by the Court.

Government Servants' Salaries.—Your council have been asked to consider the question as to why Government servants' salaries are not arrestable and to see what can be done to alter the law on the subject. The matter is engaging the attention of the Council at present.

Sheriff-Principle's Portrait.—Since the last meeting of the society the Sheriff-Principal has presented his portrait to the society and it has been hung in the library. The secretary has, by letter, tendered the thanks of the society to the Sheriff for his gift.

Ex-President's Gift.—Your council report with pleasure that the ex-president, Mr. Allan M'Neil, S.S.C., has presented the society with a gift of £5 5s., and Mr. M'Neil has been suitably thanked on behalf of the society.

Agents for the Poor. — The following gentlemen have been nominated for the ensuing year:—Messrs. R. D. C. M'Kechnie, Lindsay C. Steele, J. F. Kellas, C. Forbes Ridland, George W. Hoggan, and George M. Leys.

THE

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A WIFE'S MATRIMONIAL TRUST PROTECTION.—I.

THE progress of legislation produces new relations, and therefore starts new questions and revives old ones. This is well exemplified in the political and legal emancipation of women, and especially of married women—especially, because it was they who were deemed to experience the fullest brunt of the "subjection of women," to use the language of John Stuart Mill. The two latest chapters in the charter of emancipation, so far as Scotland is concerned, are the Sex Disqualification (Removal) Act, 1919, and the Married Women's Property (Scotland) Act, 1920. The very practical question arises—and has in practice arisen—whether by these Acts, or either of them, or in any other way by the social changes of which these Acts are important indications, there has been removed or modified the protection or disability which the law, at least as judicially declared or made, has extended to or visited upon married women in respect of the inviolability of marriage provisions when effected through a trust. We say nothing at all on the separate question whether that protection or disability was or is not a boon, though, as to that, if it were relevant, there is no doubt a great deal to be said on both sides, the truth being that that aspect of the matter really wholly depends on circumstances. But, on the other hand, the rule of law as laid down is rigid and inflexible. Lord Fraser was eloquently emphatic on the hardship and cruelty which the rule begot, but probably no experienced family solicitor would fail to cite from his own practice cases which spoke powerfully in both directions. But all that is wholly irrelevant to the purely legal issue. At the outset we do not hesitate to say that it seems to us that this rule of the inviolability of the matrimonial trust protection of married women is a clear instance of judge-made law, and we go further and

add that, in our opinion, it has been badly made. There are earlier cases, but the authority always cited is *Menzies* v. *Murray*, 1875, 2 R. 507, which was the unanimous decision of a Court of seven judges. What was there laid down was that when, in an antenuptial contract of marriage, a provision is made for the wife, whether from her own estate or that of her husband, and whether to take effect during the marriage or after its dissolution, she cannot, not even with her husband's consent, during the marriage bring the trust to an end by discharging her provision or otherwise; and it makes no difference though there is in the contract no declaration of its irrevocability, though there is no alimentary or similar clause attached to the provision, and though there are no other objects of the settlement, such as children, or though they are all in existence and competently consent. Before dealing with the grounds of judgment assigned in *Menzies*, we proceed to mention briefly the earlier cases.

Torry Anderson, 1837, 15 S. 1073.—This was a decision after consideration by the whole Court, and against a minority strong in numbers and powerful in authority—Lord Justice-Clerk Boyle, and Lords Fullerton, Moncreiff, Jeffrey, and Cockburn. The attempt to disestablish the trust was disallowed. It may be said that the question did not arise purely, for much importance was placed by the majority on a declaration of irrevocability, and there was a point as to the legal possibility of issue. Lord Jeffrey said—

> A single woman with a separate estate may frequently need all the protection which the law can give her against the influence of a domineering father or brother or a wheedling or extravagant mother or sister, and it is matter of daily observation that both men and women of facile dispositions are constantly made the victims of far worse influences than those of the common run of husbands.

Pringle v. *Anderson*, 1868, 6 M. 982.—For similar reasons to those which operated in *Torry Anderson*, this also was not the pure case. Lord Kinloch (Ordinary) upheld the sanctity of the trust out of deference to the earlier case and against his own opinion—

> It has always appeared to him (the Lord Ordinary) that the decision in *Torry Anderson* is of doubtful soundness, and that the doctrine thereby sanctioned is one which might fairly receive the reconsideration of the Court. His own opinion as to the true principle of the case accords with the view expressed by the judges who formed the highly influential minority.

This case of *Pringle* shows that there was material confusion as to what the protection amounted to. Thus the Lord

Ordinary went so far as to declare in his interlocutor that the wife had no power during the subsistence of the marriage, and even with her husband's consent, to grant any deed alienating or encumbering her provision or the subject-matter of it. But the Inner House would not have this. For one thing, they said it was a separate question which did not there arise, and which would be considered when it did arise. All they did was to declare that the trust must subsist. And they emphasised the great distinction between these two things. But then it was made quite clear that all they meant was the possible validity of—in the words of Lord Justice-Clerk Patton —" deeds which may be executed during the trust, which " shall not disturb the trust," *e.g.*, " a disposition for onerous " causes *to come into operation on the death of Mrs. Anderson.*" Now, as *Halkett's* case, 1891, 18 R. 615, shows, this stops far short of the position as now authoritatively declared; we deal with this in the second article.

Menzies v. *Murray, supra.*—This is where the modern doctrine is to be found. That doctrine must stand or fall on the reasons assigned in the judgments in this case. We confess that we are not impressed with the strength of the reasons, even if one can notionally carry the mind back to the conditions of half a century ago; and, as applied to present-day life and institutions, the effect is to make one think of those strange times when learned and upright judges signed convictions for witchcraft, for the blasphemy of denying the existence of witches, and for the treason of advocating the extension of the franchise to non-heritable qualifications. Lord Deas spoke of the wife's inability to undo the trust as a " wise and equit- " able protection not unknown in other relations of society, as, " for instance, in the case of persons under age, weak and " facile individuals, and so on." It is " founded in nature— " the admirable subjugation of the will of the one sex to the " pleasure of the other for the mutual benefit of both." " If " not already universally received, it can only be a question " of time its being (sic) recognised in some form or other in " every civilised country." Lord Neaves based his judgment on the theory that the wife is to be " protected as if her will " and mind were in abeyance."

Apart from such philosophical or unphilosophical theorising, and prophesying of the foolish and dangerous kind as the event has proved, the opinions contain certain more precise legal grounds which it is important to deal with in the light of modern developments.

1. Lord Moncreiff said—

It would be hard to say that the relatives of a bride who brings her husband a considerable fortune should have no power, by any instrument a conveyancer can frame, to place her means of future subsistence beyond the reach of matrimonial importunity.

Well (1) as we understand it, the claim of theoretical protection goes far further than that; it applies to the wife's rights in any estate, whether derived from her husband or herself or any one else; (2) on the other hand, as *Halkett's* case, *supra,* shows, the "protection" does *not* secure in fact the subsistence, whether present or future; (3) of course, every conveyancer knows how to protect through a trust, at least if it is not the lady's own money, namely, by adding an alimentary clause.

2. Lord Deas puts it in one place on "protection against "marital influence on the one hand, and self-sacrifice on the "other." Surely nowadays, as an answer to this, it is enough to appeal to sec. 5 of the Married Women's Property (Scotland) Act, 1920, which makes all donations by the wife to her husband irrevocable. Can it be suggested that this would not cover an assignment by her to him of her (non-alimentary) rights, present and future, under their marriage contract?

3. Lord Deas' analogy of pupils, imbeciles, &c., never very gallant, is answered by the complete statutory grant to married women of the fullest powers of contracting, alienating, and encumbering without the consent or knowledge of their husbands.

4. Lord Neaves made the point that the wife was prevented from relaxing her trust protection "in favour of her "natural guardian, for such he (the husband) now is." We are not quite sure of the exact meaning of "natural" in this passage, but we are dealing with a purely legal issue, and, as matter of law, the husband is now bereft of the last vestige of curatorial or administrative status, capacity, or power in regard to any act or deed of his wife.

We shall in the second article deal with the main relevant enactment in the Act of 1920, but even on the argument above stated it may be thought that not very much remains in modern times of the basis on which the decision in *Menzies* was founded.

RECENT DECISIONS IN AGRICULTURAL AND LAND LAW.

Sale—Master and servant—Lease—Valuation—Income tax.

A USEFUL piece of work which might be undertaken by the Scottish Chamber of Agriculture or the Farmers' Union in

consultation with auction salesmen is the framing of an intelligible standard form of sale conditions. There are different conditions at the various marts, and there has now been a large number of decisions on one or other of these. The recent case of *M'Donald, Fraser & Co.* v. *Foster*, 38 Sh.Ct.Rep. 50, decides that a multiplepoinding, brought in respect of the price of a horse which had been paid to the auctioneers, was incompetent. There was a dispute as to the conformity of the horse to warranty, but under the sale conditions the auctioneers were accountable to the seller only, and therefore it was thought there could be no competing claims on the price in their hands.

The *Rose Street Foundry* case, 1917, S.C. 341, which settles the competency of an action of damages for harbouring a deserting servant, has been followed in *Muir* v. *Alexander*, 38 Sh.Ct.Rep. 63. The case is a very clear instance of such a wrong, so far as a farm servant is concerned.

As is now well established main road traffic has the right of way, and, generally speaking, the onus of proof of negligence is on the traffic emerging from the side road. *MacRae & Haldane* v. *Lindsay*, 38 Sh.Ct.Rep. 35, is an instance where the onus was successfully discharged. The pursuer who was driving on the main road was held to be solely at fault and liable in damages. Sheriff Lyell's observations are in point—"Now, I "cannot help thinking that many drivers on main roads—and, "indeed, there were indications of the fallacious belief, in the "evidence in this case—have recently formed an entirely "erroneous opinion as to their rights and duties when so "driving. It is quite true that it is the primary duty of "vehicles approaching from a side road to give way to those "on a main road where there is danger of a collision, but that "does not mean that drivers on main roads may go straight "ahead and leave those so emerging to look out for themselves, "or take the consequences. It is also the duty of those on a "main road to approach a crossing with caution, and a vehicle "crossing a main road is entitled to rely on such drivers exer-"cising that caution."

In *Falkirk and District Co-operative Society* v. *Potter*, 1922, S.L.T. 33, the pursuers applied for removal of defender from a small dwelling-house belonging to them, as they required it for the occupation of a servant in their employment. The house fell under the House Letting and Rating Act of 1911, the rent being payable quarterly. The defence was that the house was let for a year. Prior to Whitsunday, 1912, this was the case, and the defender's contention was that by tacit relocation his tenancy had since that date been renewed upon the same terms.

But in December, 1811, there was passed the House Letting and Rating (Scotland) Act, 1911, which came into operation at Whitsunday, 1912. The main purpose of that Act was to provide that with regard to "small dwelling-"houses" the proprietor should be responsible to the rating authorities for the rates levied upon occupiers as well as for those levied upon owners, and to make provision for the recovery by the owners from the occupiers along with the rent of those occupiers' rates. The Act, however, did a great deal more: it imposed a number of restrictions upon the freedom of proprietors and tenants to contract with reference both to the commencement and the termination of leases of such "small "dwelling-houses"; and (sec. 12) it declared null and void any agreement made in contravention of its provisions.

Inter alia, it provided (sec. 4) that "notice to terminate the "let of a small dwelling-house on the day upon which the next "payment of rent falls due may be given by either the owner "or the occupier, and shall be given by either party in accord-"ance with the provisions of the Sheriff Courts (Scotland) Act, "1907, with respect to notice to terminate a tenancy, but "(except as hereinafter mentioned) shall expire only at noon "on the day on which the next payment of rent falls due, unless "that day is not a lawful date for the termination of a let "under this Act, in which case it shall expire only at noon on "the lawful date next following the said day . . ."

The Sheriff was of opinion that this clause when read along with sec. 12 made it reasonably clear that, at any rate, tacit relocation of a "small dwelling-house" for a period of one year is invalid unless it was a term of the original contract of let that the rent should be payable for the year in one payment either at the beginning or the end thereof; for under the provisions of sec. 4 either landlord or tenant has the power to bring it to an end at the date when the next payment of rent becomes due by giving the appropriate notice, while under the terms of sec. 12 any agreement to the contrary is null and void. He found accordingly that the let was terminable at the end of any quarter at the instance of either party.

In view of the considerable number of purchases by farmers of their lands, it is probable their position in regard to rating assessment will be much more frequently before the Courts than in the past. As to any principle in determining assessment of an occupying owner of a farm, the cases of *Miller* and *Wylie* v. *Assessor for East Lothian*, 1922, 1 S.L.T. 214, do not afford much guidance, the only general rule being that indicated by Lord Hunter, who, in refusing the

appeal, said—"In connection with the valuation of farms, "which have recently been purchased, although it cannot be "said that the purchase price affords an absolutely correct "means of determining the yearly rent or value of the subjects "for the purposes of the valuation roll, I think the considera-"tion of what is a fair return upon the purchase price does "afford one means of arriving at a decision of the question "whether the figure adopted by the Valuation Committee has, "or has not, been a fair one. Applying that test in both of these "cases, I have no doubt whatever that the Valuation Committee "have reached a fair figure."

In *Lockhart* v. *Assessor for Lanark*, 1922, 1 S.L.T. 214, the question was whether deductions allowed from the rent of grass parks in respect of prompt payment of rent and expenses of roup were competent deductions from the rent for the purpose of ascertaining the annual value. It was held they were not.

A much more important point as to grass parks seasonal letting was raised in *Donald* v. *Commissioners of Inland Revenue*, 1922, 1 S.L.T. 204. A tenant farmer is assessable for income tax under Schedule B in respect of the occupation of his farm. In *Donald's* case the farmer in question, in addition to working his farm, took certain grass parks at seasonal rents which he used for the grazing of stock brought from his farm, which at the end of the season were taken back into stock on the farm to replace older stock sold out. The Commissioners of Inland Revenue assessed him under Schedule B for his farm and under Schedule D for his profits from the grazing of the other land. This, of course, obviously raised the important question whether the Schedule B assessment covered all profits made by the farmer as a farmer. The Court held that the profits from the grazing fell to be assessed under Schedule D. "It must be remembered," said Lord President, "that the appellant is not really occupier of the grass parks at "all. All that he has under the seasonal let is a right to the "grass, or grazing, on them from May to November. He has "no let, and no occupation of, the lands composing the grass "parks themselves; and, accordingly, it is impossible to bring "him under assessment in respect of the grass parks within "Schedule B. On the contrary, the occupier of the lands "which compose the grass parks is the owner of the grass parks. "The proprietor accordingly has to pay both tax in respect of "them under Schedule A as owner, and under Schedule B as "occupier."

A point was made that the profits from the grazing rights were not capable of ascertainment. In regard to this, Lord

Mackenzie remarked—"The appellant says he is unable to give "particulars to enable the actual profits to be ascertained. "I think, if that is his position, then he has neglected to do "what ought to be done in every business, and apply the proper "principles of costing in order to find out how he stands in "regard to any particular part of his business."

THE PLEADER.

The course taken by the Second Division in opening up the case of *Auld* v. *Auld*, 1922, 1 S.L.T. 189, after the proof had been taken, would, we think, scarcely be followed had the case not been a consistorial one. On the whole, we trust the course taken will not be adopted as a precedent. The case, which was a divorce action, was decided on the evidence of three witnesses who had spoken to an *alibi*. Thereafter these witnesses lodged affidavits to the effect that the evidence they gave was untrue or inaccurate. Apparently the Court felt that, in these circumstances, they must give relief, and they took the step of opening up the proof. This is, as we have already said, unprecedented, and will not likely be followed. To admit such a practice would be to put an end to the finality of proofs and the hearing of evidence. It is the business of a litigant to test the truth or otherwise of a witness' statement by inquiry previous to the proof and cross-examination at the proof; belated discoveries after proof is heard should not be encouraged.

In Petition, *Brown*, 1922, 1 S.L.T. 191, the creditor of an Austrian firm applied to the Court to have the custodian of enemy property ordained to pay him the amount of his claim out of property in the custodian's hands. The petition was based on sec. 5 of the Trading with the Enemy Acts, 1914-1916. The custodian's objection to the competency of the petition was twofold, viz. (1) that the power conferred on the Court by sec. 5 had come to an end; and (2) that assuming that it was still effectual (*a*) it was discretionary in its character, and (*b*) if exercised it ought to be merely by way of granting an order authorising the custodian, in his discretion, to make a payment out of the moneys held by him. These objections the Lord Ordinary sustained, and we quote the concluding paragraphs of his opinion, as it may be useful as a guide to procedure in regard to similar applications—"In my opinion, the petition "is incompetent. I think that on the sound construction of "the statute the custodian, since the termination of the war "and the establishment of the clearing office under the adminis-"trator, is not subject to the orders of Court authorised by

"sec. 5 of the statute, and must hold and deal with the funds "in his hands in accordance with the directions given or to be "given by His Majesty or by Order in Council.

"Further, with reference to the argument submitted for "the petitioner, I think this dilemma arises -If the post-war "arrangements and directions contemplated by the Act of 1914 "do entitle the administrator to receive from the custodian "the money in his hands, this petition is inappropriate and "incompetent; and if, on the other hand, the post-war arrange- "ments and directions already made and given do not authorise "the administrator to receive from the custodian the funds in "his hands and deal with them, or are otherwise defective or "incomplete, nevertheless the petition is equally inappropriate.

"In either case the Court has no power or duty under the "statute to intervene at this stage on the lines of the prayer of "petition. The opinion expressed by Mr. Justice Russell in "the case of *Nierhaus*, 1921, 1 Ch. 269, although that case arose "under different circumstances, seems to me to recognise and "give effect to the construction which I am putting on the "statutory provision in this case."

In the divorce action, *Doherty* v. *Doherty*, 1 S.L.T. 245, brought by a husband against his wife on the ground of adultery, a defence appears to have been made similar to that made in the notable recent English case, *Gaskill* v. *Gaskill*, 1921, p. 425. The Lord Ordinary, however, found facts and circumstances which led him to a different conclusion than was reached in that case. In *Gaskill's* case the period of gestation was 331 days, whereas in *Doherty's* case the alleged period was 348 days.

Morgan v. *Morgan's Judicial Factor*, 1922, 1 S.L.T. 247, disclosed a state of facts which does occasionally occur, and when it does occur is difficult to deal with, namely, a wife paying the premiums of an insurance on her husband's life, and at his death the policy proceeds being diverted from the wife by operation of law. Two English cases have a bearing on the position. *In re Leslie*, 23 Ch.D. 552, Fry, L.J., dealing with the case of payment of premiums on a policy by a mere stranger, *i.e.*, one who was neither a trustee for the owner nor a part owner, said—"On principle it is difficult, if not impossible, to "see why such payments, which, when made without contract "or request, are a mere impertinence, should create a lien upon "the property. It is evident that in themselves they would not "even create a ground of personal action against the person "eased by the payment, for it is certain that moneys paid by "A for B give no right of action against B, unless they are paid

"upon his request." In a later passage in his opinion he says "In the next place, with regard to payments made by a part "owner, it appears to me that, except by contract, such pay- "ments give no title to the person making them against the "other part owner or part owners." In *Falcke* v. *Scottish Imperial Insurance Company*, 1886, 34 Ch.D. 234, Bowen, L.J., at p. 248, said—"The general principle is, beyond all "question, that work and labour done or money expended by "one man to preserve or benefit the property of another do "not, according to English law, create any lien upon the pro- "perty saved or benefited, nor, even if standing alone, create "any obligation to repay the expenditure. Liabilities are not "to be forced upon people behind their backs any more than "you can confer a benefit upon any man against his will."

Lord Hunter was not satisfied that these judgments were applicable in Scotland, and he examined the Scottish authorities.

Lord Stair (Inst. I. viii. 6 and 7), speaking of recompense, says—"This remuneration is a most natural obligation. . . . "And therefore this is a common exception in all positive laws, "that every one should be liable *in quantum locupletior factus* "*sit*. . . . Hence arises the action in law *de in rem verso:* "whereby whatsoever turneth to the behoof of any makes him "liable for recompense, though without any engagement of his "own." Other institutional writers on Scots law have made similar statements (see Erskine III. i. 11; Bell's Prin., sec. 538). In *Fernie* v. *Robertson*, 1871, 9 M. 437, Lord Gifford, at p. 440, says—"The principle of recompense is a very broad "one, and admits of wide application. . . . For illustrations "of the general rule, reference may be made to Morison's "Dictionary, *voce* 'Recompense,' 13399 (see particularly *Jack*, "13412; *Halkett*, 13412; *Rutherford*, 13422). The principle "has also been applied in several more modern cases."

There are cases of liferenter and tenant expending money upon property in which they have a limited interest without necessarily having a claim against the fiar or proprietor. In *Rankin* v. *Wither*, 1886, 13 R. 903, a husband who during his wife's life rebuilt a house belonging to her at his own expense was held after her death to have no claim of recompense for melioration against her heir-at-law. The Lord Justice-Clerk said—"This money was spent partly for the "benefit and convenience of the pursuer and his wife while they "both lived, and of his wife if she should survive him, and "partly for his own benefit if he should be the survivor, as, "according to her assurance, he was to become the fiar of the

"property. Does that come under the head of recompense? I "think it does not."

In *Morrisons* v. *Allan*, 1886, 13 R. 1156, Lord President Inglis said—"The general rule of law, I think, is quite un- "doubted—that where a liferenter expends money in improving "the subject of his liferent he is to be presumed to do so for "the purpose of enhancing his own benefit and enjoyment of "the estate. *But this rule is founded upon a presumption only,* "*and I think that presumption must yield to the facts and* "*circumstances of the particular case whenever these are sufficient* "*to show that there is a view in the mind of the liferenter and a* "*purpose for which the improvements were made inconsistent with* "*the notion that they were made with a view to his own personal* "*enjoyment of the estate only.*" In his notes to Stair, Professor More (note G on "Recompense," 3) says—"To lay a proper "foundation for a claim of recompense or remuneration, the "labour or expense must be bestowed either with the direct "intention of benefiting the third party against which the "claim is made, or in the *bona fide* belief that the subject "belongs to the person by whom the expense or labour is "bestowed." In a later passage in the same note he says—"Where, however, a person who has an interest in a subject "finds it necessary to lay out expense upon it both for his own "benefit and that of the proprietor, he may in certain cases "have a claim for recompense against the latter."

Lord Hunter reached the conclusion that it is not necessary to hold in all cases that a party who has expended money on a subject in which he has a limited interest is barred from recovering any of that expenditure. In the case before him he held that the facts warranted the application of the doctrine of recompense.

Literature.

TRIAL OF STEINIE MORRISON. Edited by H. Fletcher Moulton, B.A.(Cantab.), of the Middle Temple, Barrister-at-Law. London and Edinburgh: William Hodge & Co., Ltd. (10s. 6d. net).

After a trial lasting nine days Steinie Morrison, an Australian by birth, was on 15th March, 1911, convicted of the murder of Leon Beron, a Russian Jew, and was sentenced to death. His appeal to the Court of Criminal Appeal was dismissed, but the sentence was subsequently commuted to penal servitude for life. Morrison died in Parkhurst Prison Infirmary on 24th January, 1921. Popularly known as the Clapham Common murder, the trial here so ably reported is

one of the most perplexing and fascinating of the now long list of cases in the present series. A study of the report leaves the uncomfortable feeling that perhaps the accused was not guilty of the crime for which he was convicted. There are only a very few material facts which are satisfactorily proved. All else depends on circumstantial evidence, and that not of convincing importance. The battered remains of Leon Beron were found in the early morning of 1st January, 1911, on Clapham Common. Beron was last seen by his associates between 11 and 12 on the evening of 31st December, and then in Whitechapel. How he got from there to Clapham Common, what was his object in going there, and who went with him are all points upon which there is no reliable evidence. Morrison, on the other hand, said he was in his own room that night. Nothing belonging to Beron was found in the possession of Morrison. Three cabmen were the principal witnesses for the prosecution. They all deponed that the prisoner was in their cab in the early morning of the 1st of January, the one taking the prisoner and another man in the direction of Clapham Common, the next taking a single fare, whom he identified as the prisoner, from Clapham Cross, and the third taking two men, one of whom was the prisoner, from Kennington Church to Finsbury Park. None of the cabmen knew Morrison previously, the night was dark, there was nothing unusual in the demeanour of the passengers to attract special attention, and the identification was not made for some days after the tragedy. To the lawyer the report of the case is instructive as illustrating the working of the Criminal Evidence Act of 1898, and the right of the prosecutor to prove the previous character of the prisoner in the event of the conduct of the defence being such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. The introduction by the editor is a carefully studied summary of the evidence, and his explanation of the different functions of a judge when delivering his summing up might well be recommended to the perusal and practice of the occupants of the judicial bench.

The Roman Family and *De Ritu Nuptiarum*. 8vo. Pp. vii-100. 1922. Translated and annotated by Rev. S. A. Leathley. Oxford: Basil Blackwell. (6s. net).

In its second part this little work gave the full text of the Digest, tit. xxiii. (2), with a clear and competent translation and occasional notes of a general character. The author has written a "History of Marriage and Divorce," a work, say the reviewers, "of sound churchmanship." Hence the tendency of the introductory essay in part one of the present book to draw inferences on morals and to deplore facility of divorce which in England Dr. Leathley traces to the evil example of Henry VIII. The indubitable ease and laxity of early

Roman divorce is against the author's inference of decadence as directly occasioning legislative changes. One follows with more confidence his legal and historical expositions, although his horror at the idea of civil contract instead of sacramental union will seem to a Scottish critic scarcely justifiable. His chief authority for Roman morals and manners is Mommsen's great sketch of the new "monarchy." A systematic suggestion of parallel conditions in Rome with ourselves, *e.g.*, as regards social indulgences, love of sport, and class separations, makes this study a suggestive commentary on legislation as an expression of its age. Dr. Leathley knows, however, to keep the moralist subordinate to the civilian. The contrast helps to make more precise the purely legal element, which is the major interest of interpretative criticism. It is a balance accentuating Dr. Leathley's inductions.

A Manual of the Principles of Roman Law. By R. D. Melville, K.C., Advocate, Professor of Roman Law in the Sultanieh School of Law, Cairo. Edinburgh: W. Green & Son, Ltd. (25s. net.)

Professor Melville's manual—which has now reached its third edition—is written for a special public, viz., the Egyptian law student. It is a self-contained work of reference which the absence of Latin texts and technical terms renders particularly valuable to students who are not supposed to have a nodding acquaintance with Latin. The manual, consisting of four parts—(1) Historical, (2) Law of Persons, (3) Law of Things, and (4) Law of Obligations—contains much solid matter, and the main principles of the law are expressed clearly and at adequate length. It is an ideal book for the layman desirous of acquiring for himself a knowledge of Roman law.

Historical Introduction to the Roman Law. By F. P. Walton, K.C.(Quebec), LL.D., Advocate, Director of the Sultanieh School of Law, Cairo. Edinburgh: W. Green & Son, Ltd. (20s. net.)

The fourth edition (1920) of Mr. Walton's well-known Historical Introduction—which ought to be in the hands of every student of Roman law—is a revision (with additional references) of the second (1912) enlarged edition. To have reached a fourth edition, and to have been translated into at least one foreign language, speaks volumes for the utility and popularity of this work in the classroom. We notice that, in spite of careful revision, a slight self-contradiction still remains on page xii.

The Merchant Shipping Acts. By Robert Temperley and W. L. M'Nair. London: Stevens & Sons, Ltd. (50s. net.)

The third edition of this reference book, by Mr. Temperley, the well-known shipping lawyer, of the firm of Botterell, Roche, & Temperley, well maintains its usefulness. The

author has been assisted in the preparation of this edition by Mr. W. L. M'Nair, of Gray's Inn, barrister-at-law, and the work presents, in compact form, convenient for reference, the merchant shipping law up to date. Since the last edition in 1907, over a dozen Acts have been passed, making now in all on the statute book some twenty Acts relating to merchant shipping. During the fifteen years which have elapsed since the last edition about 300 fresh judicial decisions have been pronounced. The revised notes in the present edition embody the effect of all these; and also the text of such important new legislation as the Maritime Convention Act of 1911, relating to collisions at sea; the new Pilotage Act of 1913; the Scottish Fisheries Boats Act of 1914; and the Merchant Shipping (Convention) Act of 1914, dealing with the safety of life at sea. The provisions of cognate statutes are also included, such as the Childrens Act so far as relating to employment of young persons on board ships, and the Workmen's Compensation Acts, so far as affecting the mercantile marine. A most useful feature of the book is the marginal references to other statutes, opposite each section, especially those showing the corresponding clauses of the first Merchant Shipping Act of 1854, for many of the important judgments of the Court, which are still ruling decisions, were pronounced under that statute. A very carefully prepared copious index enhances the value of the book for reference purposes. The existing law is presented in a fashion so simple, and under an arrangement so clear, as to make consultation of the book easy for the layman, as well as the lawyer. The publishers have done their share of the work admirably.

Obituary.

At Glasgow, on 11th April, Mr. William James Begg, of Messrs. W. J. Begg & Noble, aged sixty-one. Mr. Begg was born in Rutherglen, and served his apprenticeship in the office of Messrs. Rodger, Watt & Paul, solicitors, Glasgow. After qualifying as a law agent, he became managing clerk to Mr. A. Graham, solicitor, Crieff, and acted thereafter in a similar capacity with Messrs. J. & A. F. Adam, W.S., Edinburgh. In 1886 he started business on his own account in Glasgow, and a few years ago assumed Mr. George Noble as a partner. Mr. Begg acted as honorary secretary for Scotland of the Peace Society, and was also closely associated with the Anti-Vaccination League. Under the auspices of the latter body he vigorously opposed compulsory vaccination, and appeared for the defence in many cases of prosecution in the Sheriff Courts. He was also a leading member of the Society of Friends.

At Kirkcaldy, on 11th April, Mr. James Inglis, senior partner of Messrs. Thomas Dow & Son. Mr. Inglis was appointed town-clerk of Kinghorn about seven years ago, on

the death of his late partner, Mr. William Millie Dow. He was joint agent of the British Linen Company Bank in Kirkcaldy. Mr. Inglis, who was in his sixtieth year, was a native of Glasgow, and went to Kirkcaldy over thirty years ago. He was unmarried.

At Mulliam, Cornwall, on 18th April, Mr. Henry Inglis Lindsay, W.S., of Messrs. J. K. & W. P. Lindsay. Mr. Lindsay was clerk to the Water of Leith Purification and Sewage Commissioners from 1901 up to the date of the amalgamation of Edinburgh and Leith. He was educated at the Edinburgh Academy and University, and was admitted a member of the Society of Writers to the Signet in 1889. He is survived by his wife.

At Dunoon, on 18th April, Mr. John Campbell, J.P., Sheriff-clerk depute of Argyll.

Notes from Edinburgh.

Parliament House, *29th April*, 1922.

According to traditional custom, the approach of a new session is heralded in advance with the casting abroad of prophecy anent the resignation of a Court of Session judge—on this occasion the prophecy is modestly confined to one -and to the many anxious seekers after truth who are expert and keen in getting on to the trail of portents there have come many convincing items of evidence that a certain judge has actually sent in his resignation. To do them justice, the portent-hunters have had their noses on a good trail this time, but one thing they will not discover before the 12th of May when the Court meets, which is the date when the alleged resignation is going to take effect. Allowing that the rumour has something to go upon, it should be borne in mind that the summer session is a very short one, and any retirement presently contemplated could easily be arranged to come into effect on 15th October next rather than on 12th May. From a financial point of view the position of a Lord of Session is not anything approaching to the comfortable position of pre-war days, for heavy taxation without any compensation by way of bonus has put the emoluments on a very modest level, and even with Sir Robert Horne's kind removal of 1s. per pound from the ordinary income tax, the allurements offered by the bench are not such as will attract any aspirants save those who are wealthy or those who have become resigned to modest fortunes. This state of matters is not for the good of the judicial bench, and if the country is to enjoy the best legal talent available, it is but seemly that the position of its dispensers of law and justice should be at least

as comfortable as the position which they held when appointed to judicial office, taxation or no taxation. There is a belief entertained publicly that all Lords of Session roll in wealth. The tax-gatherer can tell a different tale. Indifferent health or great age is naturally a strong inducement for a judge to give up the reins. For a storm-tossed man the judicial bench may still offer itself as a haven of rest, but unless the storm-tossing has been lucrative, the haven of rest will not be found to be a harbour with any golden bar to it, and irrespective of the dignity and rest to be enjoyed, there is not much to attract pleaders who are in the first ranks to the bench.

On 21st April there was published in the *Glasgow Herald* an article by a well-informed legal contributor under the title "Economy and Law" (curious combination surely), and, while the suggestions therein made, from a Court of Session point of view, seem very revolutionary, they are none the less well worthy of consideration. The main platform of the writer would seem to be the raising of the status of the Sheriffs-Substitute and the abolition of Sheriffs and Outer House judges, with the creation of three appellate Divisions of three judges each, the Sheriff Courts to be the only Courts of first instance; and he figures out that this would save the country something like £50,000 annually. He claims that the Sheriff Courts are now capable of dealing, and do actually deal, with cases of as great importance as any which come before the Outer House judges, and he points out that the Sheriff Courts are manned by judges who are drawn from the same class of practitioners as provides judges for the Court of Session. This last assumption is hardly justified, for, with the exception of Edinburgh and Glasgow, the gentlemen who receive appointments as Sheriffs-Substitute have never been drawn from the ranks of skilled, experienced, and successful counsel—it would not have paid skilled, experienced, and successful counsel to sink their prospects of attaining to something much higher, and for that matter, the Court of Session bench itself, as before-mentioned, cannot nowadays offer great attractions financially. There still happen to be classes of cases which only the Court of Session can deal with, such as reductions, divorces, declarators of marriage and of nullity, putting to silence, cognition of the insane, choosing curators, and some others of more historical than practical interest, and, as mentioned by the *Herald's* contributor, there are still civil jury trials which Sheriff Courts have not as yet had entrusted to their jurisdiction. There is one class of civil jury trial which since 1907 has had a chance of raising its head in the Sheriff Court, viz., jury trial in claims

at the instance of workman against employer, and the few cases of this sort which have had their histories handed down were so mismanaged by all concerned in the inferior Courts that such trials have become unknown almost. The one case of the sort which went to the House of Lords after an appeal to the Court of Session had been taken against the entering of judgment on a verdict, seems to have killed the chances of other cases being tried. Civil jury cases to be properly handled require practice and experience on the part of both bench and bar. Few Sheriffs-Substitute have, as pleaders, had any experience of them, and local practitioners have, for the most part, had none. The same thing could have been said about the Court of Session in 1815 when a Commissioner was sent here from London to instruct the judges and all others concerned into the mysteries of jury trials; and no doubt that could be done now, were jury trials to be relegated to the Sheriff Courts, by having Commissioners sent from Edinburgh to the Scottish provinces to disseminate the necessary information, but as political credentials still have some weight, the possibility of incompetent Commissioners being appointed should be considered, and Commissioners would want to be paid. The article allows for three appellate Divisions. Presumably the writer would permit the *nobile officium* to continue to be exercised in certain classes of petitions, also company, educational, and other Inner House petitions which Sheriff Courts as yet do not touch. Just at present two Divisions are ample for all such work in addition to the hearing of appeals and reclaiming notes, though later it might be three Divisions would find occupation, as in the palmy days, when the Extra Division was in use.

As a title "Economy and Law" might suggest that to be able to resort to law rigid economy must be practised by the would-be litigant. Whether that be a natural inference or not, it is a true enough one; and anybody who can put oil on the wheels of economy, in the interests of the litigant and in the interests of the taxpayer, is entitled to respectful attention. If the Geddes axe had not been a hatchet at all, but had been instead a tooth-comb, fine as to texture and design, it might have been possible for people able to write as the *Herald* contributor has done, on such a subject, for instance, as "Sine-"cures and Law." The day has gone for sinecures. If any such can be found in the legal or any other establishment, the holders should be invited to explain what difference exists between themselves and the people who now and then are prosecuted for fraudulently drawing doles for unemployment.

The indignation expressed recently by Lords Justice Bankes,

Warrington, and Atken in the Court of Appeal in London, at the publication in newspapers of an alleged interview with the foreman of the jury which sat in the Armstrong trial for murder, was surely well justified, and it may be hoped that some decent appreciation of the solemnity of a juror's duties will be recognised not only by pressmen but also by jurors themselves. We had in Scotland quite recently an example of this monstrous pandering to the Sunday palates of newspaper readers following on the trial of alleged Sinn Feiners for conspiracy and murder—the Glasgow prison-van hold-up case—when one of the lady members of the jury let herself go to a newspaper reporter, disclosing a lot of her personal impressions and experiences while engaged at the lengthy trial; and now that women are regularly appearing in the panels, the dangers of loose tongue-wagging outside the jury room seem to call for a check. A woman who, after helping to arrive at a verdict, can chatter at large about her disinclination to hang a fellow-creature cannot be regarded as a safe addition to our judicial administration. In Scotland, before the advent of the female juror on the scene, there never was cause to complain of unseemly post-trial scattering of inside information to the press or even to private individuals.

Sheriff-Substitute Forbes has not had long to wait for transference from his outpost at Lerwick to a sheriffdom in Scotland proper, for after only eighteen months in Shetland he has, on the resignation of Sheriff-Substitute Campbell, been brought to Dornoch. The vacancy thus created at Lerwick has been filled by the appointment of Mr. J. P. Grant, who came to the bar in 1912. He served through the war in Lovat's Scouts, and came out with the rank of major. He has had recent experience of a Sheriff-Substitute's duties, having for some months officiated temporarily at Oban.

The rolls issued on the two box-days in vacation show that for the summer session there is ample work available to keep the Court going in all departments, though one would have liked to see the Outer House procedure rolls better filled than they are to start with. The Inner House, putting the figures for both Divisions together, has 90 cases to depend on, irrespective of additions received in vacation, and the mainstay known as the short roll has 57 cases of the 90, the First Division having 35 and the Second Division 22. The First Division has also 16 cases in summar roll and 10 standing sisted in the long roll, while the Second Division has 5 in the summar roll and 2 in the long roll. The five Lords Ordinary are provided with material as follows:—Lord Anderson has 3 cases in procedure

roll, 9 proofs, and 3 jury trials, the last diet being 14th July; Lord Sands has 9 in procedure roll, 17 proofs, and 4 jury trials, the last date being 18th July; Lord Blackburn has 7 in procedure roll, 15 proofs, and 2 jury trials, fixed down to 4th July; Lord Ashmore has 9 in procedure roll, 13 proofs, and 6 jury trials, the last diet being 18th July; and Lord Morison has 13 in procedure roll, 14 proofs, and 1 jury trial, fixed down to 11th July.

The new summonses called during the vacation amount to 154, and of these there are 60 consistorial causes, 58 being divorces, 1 separation and aliment, and 1 declarator of nullity. Lord Anderson has 46 of the total, there being 27 divorces and 1 declarator of nullity; Lord Sands also has 46, of which 17 are divorces, with 1 separation and aliment; Lord Ashmore has 35, there being 9 divorces; Lord Blackburn has 18, there being 3 divorces; and Lord Morison has 9, there being 2 divorces.

Notes from London.

The Temple, *29th April*, 1922.

At the close of the sittings when the Easter vacation began the state of business in the King's Bench Division was more satisfactory than usual—for the simple reason that the judges of that Division had been able to attend to their own work. They had not been called away to sit in the Probate and Divorce Division, as had occurred previously, in order to help the judges of that Division in coping with the tremendous flood of cases which had since the war been overwhelming them. But while the King's Bench Division during last sittings were not affording the aid they had been rendering previously, the Divorce Court judges again fell into arrears, and were unable to transact their business with reasonable promptness. The consequence is that in the approaching Easter sittings, which will have begun when these Notes appear, it is announced that help will have to be rendered again by the judges of the King's Bench Division to those of the Divorce Division. It is a vicious circle, because we must expect now that the King's Bench Division itself will fail to deal with the actions in its list with anything like sufficient promptitude. The rules empowered to be made by the Act of 1920 have not yet been published for the trial of divorce cases at assizes, and consequently there has not been the relief which was expected for parties to divorce suits in the country who were to be saved the expense of coming to the Courts in London.

The announcement, made by Lord Birkenhead himself in

the House of Lords, that his health had broken down, and his request for a month's rest from his arduous and multifarious duties, came with a shock of surprise to the profession. It was the more startling after the exciting episode of his struggle with Lord Carson on the subject of the political speeches which the latter had made, and which the Lord Chancellor had objected to as being unsuitable to the judicial character of a Lord of Appeal, and, above all, if made outside the House of Lords. The Lord Chancellor had of late been apparently overflowing with health and vigour, and his activity in politics had certainly not been less striking than that of Lord Carson. The chief symptom of his ill-health is the condition of his eyesight. With all the inconveniences and hard work of a Lord Chancellor it is fortunately not so difficult for him as it is for many others to get the rest and change he needs, and it is not necessary for him to delay taking precautionary measures until disability has gone too far; accordingly the Lord Chancellor is at present away for a month's rest. We hear of him, however, visiting Genoa in his yacht with his usual determination not to miss anything possessing political interest, and the Great Seal is in commission with Lord Crawford, Lord Haldane, Lord Finlay, Lord Buckmaster, Lord Sterndale (Master of the Rolls), and the new Lord Chief Justice, Lord Hewart, as Commissioners.

In the speech made by Lord Birkenhead in the House of Lords as to his health he ascribed the cause for his breakdown to the overwhelming demands which are made on the strength of a Lord Chancellor by the multifariousness and arduous nature of his duties. He again emphasised what previous Lord Chancellors had emphasised, the necessity for a rearrangement and modification of the duties which a Lord Chancellor is at present called upon to perform. He referred to the *tu quoque* of Lord Carson in the dispute about the Lord Chancellor's own political speeches and political activities. Of course, there is an extraordinary inconsistency in the freedom of the Lord Chancellor in taking part in political discussions, while the law lords are expected to be more or less mute about politics. But the Lord Chancellor expressed the opinion that it would not be this anomaly which would bring about a modification of the office of Lord Chancellor. It would come, he believed, "as "the result of the increasingly grave burdens which are im- "posed upon the holder of the Woolsack in relation to the "general business of the country." The Lord Chancellor, in short, has so many things to do that no one man can be expected to do them. Lord Herschell, Lord Loreburn, and Lord Haldane have all within recent years dwelt on the same theme. Lord

Haldane, for instance, as a witness before the Royal Commission on the Civil Service a few years ago said that "the office "of Lord Chancellor had been an impossible one for its occu- "pant to discharge efficiently, and two Lord Chancellors could "not get through the work which devolves on one." Seventy years ago Lord Langdale, then Master of the Rolls, was offered the Chancellorship, but refused it on the ground that no one could perform all the duties that are annexed to the office of Lord Chancellor. There have been rumours that Lord Birkenhead was intending to resign on account of his health, but there is no reason to suppose that he will need to do anything of the sort; though when a man has to labour constantly fourteen or fifteen hours a day, at what he termed the vast judicial, administrative, and political duties which attach to his office, it would not be very surprising if he should think of resignation unless some rearrangement were made by which it would become unnecessary for him to overburden himself so much beyond any one man's strength.

Referring back to the earlier question at issue between the Lord Chancellor and Lord Carson, it will be interesting to Scottish readers to recall the instance of Lord Robertson, who was a Lord of Appeal in 1905, and who got into trouble with the Government by a speech he delivered in that year in the House of Lords on the fiscal question, upon which he differed from the Government policy. Mr. Alfred Lyttelton administered the same kind of rebuke to Lord Robertson then that Lord Birkenhead has administered to Lord Carson, though Lord Robertson's speech was made in the House of Lords and not on a public platform. But in any case a Government will censure a person in Lord Carson's position for an attack where it would pass by a speech in its defence, though both speeches would be equally instances of partisanship and breaches of the rule of judicial aloofness.

Another of the rather scanty legal events of the month, which has been a short one, on account of the closing of the Courts for the Easter vacation, was the meeting of the Chancery King's Counsel to consider a proposal that the rule that Chancery K.C.'s should be attached to the Court of a particular Chancery judge ought to be abolished. Unlike the leaders on the common law side, these Chancery leaders cannot appear before any other judges of first instance than those to whom they are attached, without a special fee over and above the ordinary fee. The effect of this practice is to give a monopoly in each Court to perhaps two or three leaders.

Sometimes the existing rule enables the bench to exercise undue control over the bar, but it may enable the bar to

exercise an undue influence over the bench; and this has been known in many instances of an earlier date which one can recall. One good effect the system has, no doubt—litigants can rely more surely on the presence of the leading counsel briefed before a Chancery judge than on that of leaders in the common law Courts—I am speaking in both cases of the trial Courts. One cannot go into all the merits and demerits of the rule; but, at any rate, it does not suit some of the bar, and they tried to get the rule altered. As might be supposed, the force of conservatism and tradition, whatever the merits might be, has been sufficient to bring about a decision in favour of continuing the existing system. Yet it appears that the present system has only been known for some ninety years, and it was introduced because at that time when Sir George Stephen wrote "An Attorney in Search of a Practice," an interesting and curious book which I remember reading one long vacation years ago, he says that before the system was introduced attorneys "were obliged to employ four or five "leaders in every cause in Chancery, because we never could "reckon with certainty on the attendance of even one. This "man was at the Rolls when we wanted him before the Chan- "cellor, and that man was in the Vice-Chancellor's Court when "wanted at the Rolls." The Chancery bar at that time did not like the change from the old system then in use, but now they have become wedded to the existing system as introduced ninety years ago, as we might expect, merits or no merits. It is perhaps better, on the whole, that litigants should be able to have a free selection of the counsel they desire, though there are some drawbacks such as the uncertainty of their appearing when wanted; but that might be largely countervailed by the public running less after fashionable advocates whose fees they send up to extravagant heights.

A certain number of cases in the Courts during the month attracted much popular interest. Two of them raised the question of the liability of husbands for their wives' orders with tradesmen for so-called "necessaries." Mr. Justice M'Cardie is notable for his written judgments, which exhaust almost the whole case law on any given subject, where most judges would be content with much less exuberance of expression. He was in his best form in laying down the law as to the giving of credit by tradesmen to wives in the case of *Miss Gray (Limited)* v. *Cathcart*. He has the faculty of enunciating sententious, ethical, and social propositions which enliven his judgments and supply admirable texts for newspaper articles which call attention to his decisions. *Miss Gray (Limited)* v. *Cathcart* had a great success from this point of view. There

was no new decision as to the law of husband's liability for necessaries, but the judgment was expressly stated to be given for the benefit and guidance of tradesmen; and it caught on with all classes of shopkeepers, inasmuch as the plaintiffs in the case lost in circumstances in which tradesmen are accustomed to rely on the liability of the husband. Three or four days later Mr. Justice Rowlatt had before him a case of *Seymour* v. *Kingscote*, where the husband was sued for his wife's "necessaries"—a rather startling description for large quantities of costly dresses. This emphasised the controversy, as in this second case the husband was held liable. Mr. Justice Rowlatt also gave a disquisition on this branch of law, and it may be hoped that tradesmen now understand why two judges in apparently similar cases came to precisely opposite conclusions.

Some reference should be made to the Armstrong trial, but on its popular, as distinct from its legal aspects, there is very little that is necessary to say, as the newspapers have made every detail of it familiar. There is, however, an important question of law which is likely to be brought before the Court of Criminal Appeal, and which should be mentioned. This question is whether the evidence as to the alleged attempt to murder Mr. Martin was rightly admitted by Mr. Justice Darling as evidence bearing on the charge of the murder of Mrs. Armstrong. For the purpose of proving intention or design Mr. Justice Darling's ruling is generally considered as expressing the true rule in such cases; though I have heard very strong opinions expressed by criminal lawyers that in the Armstrong case the evidence ought not to have been admitted, or that there ought to have been a separate trial on each separate charge. Without saying more than this, one may at least say that so striking was Mr. Justice Darling's intellectual and physical energy in dealing with every aspect of the case that it would be an enormous surprise for the profession if his view did not obtain the support of the Court of Criminal Appeal as to the admissibility of the evidence. The vitality of Mr. Justice Darling in his seventy-third year was one of the most remarkable features of the trial.

NOTES OF ENGLISH CASES.

THE following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these

notes. Cases repeated in the *Times* Law Reports have the reference added.

51. Immunity from Process of Representatives of Foreign State 7 Anne, c. 12—Trade Agreement with Russia of 16th March, 1921. *Held* that a representative of Russia under the Trade Agreement was not exempt from process. *Fenton Textile Association, Limited* v. *Krassin*, C.A. 16th December. 38 T.R. 259.

52. 37 T.R. 857., affirmed. Action to recover sums of money paid into bank by two plaintiffs to credit of Russian Government for licence to export wool bought in Russia, the equivalent in roubles to be paid by the Government to sellers in Russia. The Revolution frustrated the transaction. *Held (a)* that the first snm was not paid without consideration, and must remain in bank until Russia was heard ; *(b)* that the second sum paid into bank after the Revolution had broken out was so paid under a legal obligation when the Provisional Government was still in existence, and must remain in bank meantime. *Steam Saw Mills Co., Limited* v. *Baring Brothers. Archangel Saw Mills Co.* v. *the same*, C.A. 16th December. 38 T.R. 200.

53. No. 173, vol. xxxvii. 37 T.R. 743, affirmed. Increase of Rent, &c., Act, 1920, sec. 12 (3). A self-contained dwelling-house of three flats was let on 3rd August, 1914, at £65. In 1916 it was converted into three separate self-contained flats. The top flat was let for the first time in June, 1917, for £50. *Held* that the top flat then became a separate dwelling to which sec. 12 (1) (*a*) applied, and that there was no ground for apportionment of rent. *Sinclair* v. *Powell*, C.A. 16th December. 38 T.R. 239.

54. 37 T.R. 46, reversed. Collision—tug and tow—limitation of liability. A collision took place by the fault of the tug. The tug and tow belonged to the same owners. *Held* (*a*) that the tow was responsible as the fault was that of the owners' servants, although not on board ; (*b*) that in limiting liability the tonnage of the tow, and not of the tug, must be taken. *The Graygarth*, C.A. 19th December. 38 T.R. 208.

55. Maritime Conventions Act, 1911, sec. 1—collision—both to blame. Ship sailing under convoy of destroyer came into collision with her. *Held* that the ship was first in fault, and the destroyer was next in fault, and no damages due. Lord Finlay said that the Lord Chancellor's judgment was a great and permanent contribution to the law of contributory negligence and to the science of jurisprudence. *Lord High Admiral* v. *Owners of S.S.* "*Volute*," H.L. 15th December. 38 T.R. 225.

56. Estate Duty—Finance Act, 1894, secs. 2 (2), 8 (4)—Legacy Duty Act, 1796, sec. 12—Succession Duty Act, 1853, sec. 18. Legacy by father to married daughter in liferent and fee to her issue with power of appointment which she exercised. Funds invested in American Securities. *Held* that on daughter's death estate duty was payable under above Acts. *Attorney-General* v. *Burns*, K.B.D. 21st December. 38 T.R. 124.

57. No. 138, vol. xxxvii. 37 T.R. 594, affirmed. Merchant Shipping (Liability of Shipowners and Others) Act, 1900, secs. 1, 2, 3. Merchant Shipping Act, 1894, secs 503, 504, 530. Mersey Dock Act, 1858, sec. 94. A steamship destroyed dock gates and caused damage to barges. *Held (a)* that the statutory limitation of liability applied to all *pari passu* ; *(b)* that the statutory lien of the Mersey Docks Board

gave them no preference. *The Countess*, C.A. 20 December. 38 T.R. 218.

58. Fatal Accident Act, 1846—Marine Pay and Pensions Act, 1865, sec. 3—Amended Rules, No. 1021, of 1920. Claim of damages by widow for death of husband by collision. *Held* that her pension under the Pensions Act was not to be deducted from the damages as it was in the discretion of the Crown. *Baker* v. *Dalgleish S.S. Co.*, C.A. 20th December. 38 T.R. 245.

59. Increase of Rent, &c., Act, 1920, secs. 3, 15 and 16. After a notice to quit has been served along with a notice of increase of rent, the tenancy becomes statutory and there is no need for subsequent notices to quit. *Shuter* v. *Hersh*, K.B.D. 15th November. 38 T.R. 127.

60. Charter party—signature "as agents."—Action by owners against signatories for demurrage. *Held* that they were not personally liable. *Ariadne Steamship Company* v. *James M'Kelvie & Co.*, C.A. 9th December. 38 T.R. 235.

61. Unemployment Insurance Act, 1920. A charwoman cleaning a solicitor's office, a school cleaner, and an office caretaker employed by a County Council are all outside the Act. *Ex parte Wilkinson; ex parte Berkshire County Council; ex parte Ffooks*, K.B.D. 13th January. 38 T.R. 254 and 255.

62. Principal and agent—undisclosed principal. Judgment was obtained against the principal, but nothing recovered. The creditor then sued the agent. *Held* that he had made his election, and that the agent could not be sued. *London General Omnibus Company, Limited* v. *Pope*, K.B.D. 20th January. 38 T.R. 270.

63. Arbitration—finality of decision of umpire. Where parties have agreed that his decision shall be final, the Courts will not inquire into it unless an error appears on the face of the award. *Attorney-General for Manitoba* v. *Kelly*, P.C. 24th January. 38 T.R. 281.

64. Sale of Goods Act, 1893, sec. 13. Contract for sale of cotton cake, "no guarantee of quality or analysis given," the cake to be in merchantable condition at time of shipment. The goods were not up to analysis, nor in good condition at shipment. *Held* that the sellers were liable in damages. *Wimble* v. *Lillico*, K.B.D. 27th January. 38 T.R. 296.

65. Finance (New Duties) Act, 1916, sec. 1 (4). Entertainment duty—cricket club. *Held* that duty was payable on the admission of members to matches although they entered free under their subscription. *Attorney-General* v. *Swan*, K.B.D. 1st February. 38 T.R. 315.

66. Evidence—application for new trial on ground of surprise and fresh evidence—application refused and principles laid down. (Compare *Miller* v. "*Mac*" *Fisheries, Limited*, 1922, S.L.T. 94.) *Guest* v. *Ibbotson*, C.A. 7th February. 38 T.R. 325.

67. Income Tax Acts, 1842, sec. 146, and 1853, secs. 2 (*e*) and 51. A deduction from a salary under a superannuation scheme is taxable. *Bruce* v. *Hatton*, K.B.D. 13th December. 38 T.R. 323.

68. Prize—capture in neutral territorial waters, No. 155, vol. xxxvi. 36 T.R. 539, reversed. Four German vessels outside the Dutch three-mile limit, were signalled to stop, but not actually seized until within the limit. *Held* that they were not captured until within

the limit, and must be handed to the Dutch Government. "*The Pellworm*," P.C. 13th February. 38 T.R. 338.

69. Prevention of Crime Act, 1908, sec. 10. Consideration of the rules governing the conviction and sentence of habitual criminals. *Rex* v. *Harris and Others*, C.C.A. 13th February. 38 T.R. 343.

70. Stage coach licence. "Plying for hire" means soliciting custom without any previous contract. *Sales* v. *Lake*, K.B.D. 13th February. 38 T.R. 336.

71. No. 210, vol. xxxvii. 37 T.R. 936, affirmed, with a variation. Increase of Rent, &c. (Restrictions) Act, 1920, sec. 5 (1) (*d*), applies to a tenancy for a term certain, and prevents the landlord from exercising his common law right of re-entry on the expiry of the term. *Cruise* v. *Terrell*, C.A. 15th February. 38 T.R. 379.

72. Wills Act, 1837. Termination of War Act, 1918, sec. 1. An officer in barracks in May, 1921, *held* not to be on actual military service, although his regiment was under standing orders to proceed to Ireland. *Re Gray*, deceased, P.D. 27th February. 38 T.R. 401.

73. Landlord and tenant—repairs. Where the landlord's means of knowledge of disrepair are as great as the tenant's, he does not require notice of disrepair. *Murphy* v. *Hurly*, H.L. 20th February. 38 T.R. 386.

74. Hire purchase, No. 13, *supra*. 38 T.R. 23, reversed, on the ground that the point had not been raised before the County Court judge. *Nelson, Murdoch & Co.* v. *Wood*, C.A. 21st February. 38 T.R. 393.

75. No. 125, vol. xxxv. 38 T.R. 406, affirmed. Undue traffic on road. *Butt* v. *Weston-super-Mare U.D.C.*, H.L. 21st February. 38 T.R. 406.

76. No. 214, vol. xxxvii. 37 T.R. 949, affirmed. Income Tax Acts. Engineers in Copenhagen with their representative in London, *held* not subject to income tax. *Greenwood* v. *Smidth*, H.L. 27th February. 38 T.R. 421.

77. No. 64, vol. xxxvii. 37 T.R. 300, affirmed. Charter party—a custom of port inconsistent with the charter party cannot be read into the charter party. "*The Turid*," H.L. 27th February. 38 T.R. 423.

78. Interpretation of statute. A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together. *Wallwork* v. *Fielding*, C.A. 8th March. 38 T.R. 441.

79. No. 190, vol. xxxvii. 37 T.R. 850, affirmed. Commission to ship brokers—charter ship sold during charter. *Held* that right to commission had ended. *French* v. *Leeston Shipping Company, Limited*, H.L. 10th March. 38 T.R. 459.

80. No. 105, vol. xxxvii. 37 T.R. 388, reversed. Income Tax Act, 1842, sec. 146, Schedule E, rule 3—Income Tax Act, 1860, sec. 6. A clerk employed by a railway company is not within rule 3 so as to make the railway company liable to pay income tax on his behalf. *Great Western Railway Company* v. *Bater*, H.L. 14th March. 38 T.R. 448.

81. Liquidation of bank—claims—date of fixing rate of exchange. (*a*) In a claim on current account the date was fixed as at the closing

of the account, as against the date of winding-up order; (*b*) in a claim of damages for breach of contract, the date of breach was fixed as the date for conversion into English money. *Re British American Continental Bank, Limited, in liquidation*, Ch.D. 15th March. 38 T.R. 464-465.

Appointments, Business Changes, &c.

Mr. J. W. Forbes, advocate, Sheriff-Substitute of Caithness, Orkney and Zetland, at Lerwick, has been appointed Sheriff-Substitute of Ross, Cromarty and Sutherland, at Dornoch, in place of Mr. G. J. Campbell, resigned.

Mr. J. P. Grant, jun., advocate, has been appointed Sheriff-Substitute of Caithness, Orkney and Zetland, at Lerwick, in place of Mr. J. W. Forbes.

Law Agents' Examinations.—The quarterly examination in law was held by the examiners of law agents in Edinburgh last month, when 54 candidates presented themselves for examination. Thirty-one of these were examined in all the subjects, and 22 passed, and 23 graduates in law holding the degree of LL.B. or B.L. of the Scottish Universities, were examined in Court procedure, and all passed.

The examiners at their meeting also granted certificates of exemption from the first examinations in general knowledge to three applicants who have served in His Majesty's military forces during the late war, and who have satisfied the examiners as to their general education for entering upon indentures of apprenticeship in terms of the Act of Sederunt of 19th March, 1919. The following candidates have passed the examination:—Gordon Buchanan Anderson, Glasgow; William Johnston Cuthbert, M.A., LL.B., Glasgow; Robert Cecil Davidson, M.A., LL.B., Edinburgh; Albert Gibson Deans, Glasgow; Alexander Anderson Donald, Edinburgh; Walter Sinclair Drever, Edinburgh; John Anderson Dunlop, Glasgow; Herbert John Edwards, B.L., Aberdeen; Robert William Nicholson Evans, Glasgow; James Gourlay Freeland, B.L., Glasgow; Patrick Philip Lyon Gardiner, B.L., Edinburgh; Harold Georgeson, B.L., Wick; Andrew Mathieson Halden, Paisley; Herbert Walter Hayworth, B.L., Glasgow; James Headrick, B.L., Glasgow; Richard Ian Hewat, B.L., Castle-Douglas; David M'Cowan Hill, M.A., LL.B., Glasgow; Robert Younger Hunter, M.A., LL.B., Edinburgh; Donald George Jack, B.L., Edinburgh; John M'Queen Kerr, Glasgow; James M'Laurin Little, B.L., Dalbeattie; James Andrew M'Ara, Glasgow; Francis John M'Cluskey, Glasgow; Peter George Macdonald, Forres; Athole Gordon Mackintosh, Inverness; William Donald Macrae, B.L., Glasgow; James M'Naught M'Robert, Wigtown; John Aloysius M'Sparran, Glasgow; William Maltman, Alva; Alexander Moncrieff Mitchell, M.A., LL.B., Glasgow; John Picken Morrison, Paisley; John Lindsay Muir, Edinburgh; John Norval Murray, M.A., LL.B., Glasgow; James Lyndsay Orr, B.L., Glasgow; James Alexander Rendall, B.L., Glasgow; John Brown Robb, M.A., LL.B., Stirling; Frederick Robinson, Edinburgh; Douglas Hollingsworth Sayers, B.L., Glasgow; James Stewart, B.L., Hamilton; George James Tait, B.L., Edinburgh; Edward Rolland M'Nab Taylor, Edinburgh; Frederic John Thomson, Glasgow; James Beveridge Thomson, Edinburgh; David Paterson Walker, B.L., Glasgow; Leslie Binnie Weatherhead, Edinburgh.

Incorporated Society of Law Agents in Scotland.—A meeting of council was held in Edinburgh on 20th April, Mr. John Pattison, Paisley, the vice-president, in the chair.

Law of Diligence.—The secretary submitted copies of the memorial recently presented to the Secretary for Scotland on behalf of the legal societies throughout Scotland calling attention to the hardships inflicted on the public through the scarcity of sheriff officers and the expense of executing diligence, and suggesting that a Departmental Committee should be appointed to inquire into the whole question of the carrying out of diligence and the provision of adequate facilities.

Law of the Tenement.—Mr. Whyte, Stirling, submitted revised report on this subject, with a series of forms appended thereto. The council approved of the same, and resolved to issue copies to each member of the society.

Admission of Law Agents in New Zealand.—The secretary reported receipt of letters from the Attorney-General and the secretary of the Law Society of New Zealand intimating the passing of an amending Act which provided for the admission of law agents to practice in New Zealand on the same footing as Writers to the Signet and Solicitors in the Supreme Courts were admitted.

Increased Fees in Sasine and other Offices.—The vice-president and Mr. Whyte reported as to a meeting of representatives of the legal societies in Edinburgh on 7th April, when a committee was appointed to prepare a memorial to the Treasury. The draft of this memorial was laid before the council, who remitted to the vice-president and Mr. Whyte to revise same and to adjust the memorial in its final form.

Report on Membership.—The secretary reported that during 1921 150 new members had been admitted and 18 names were removed from the roll. The number of members now exceeded 1000.

Legislation by Reference.—A letter from the Faculty of Procurators of Dumbartonshire drawing attention to the practice of legislation by reference was submitted, and the council concurred in the view expressed of the undesirability of this practice, and agreed to take a favourable opportunity for making a representation on the subject.

Cost of Printing in Court of Session Appeals.—A letter was read from Messrs. T. S. H. Burns & Son, Dingwall, complaining of the cost of printing, and suggesting that typewritten copies of documents should be accepted by the Court in place of prints. The council continued the matter for inquiry and future consideration.

THE

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THE POWERS OF TUTORS UNDER THE TRUSTS (SCOTLAND) ACT, 1921.

THE terms of this Act were supposed to be based on the experience of the working of the earlier Trusts Acts passed from time to time between 1861 and 1910. Nevertheless, their meaning and the scope of their application give rise to difficulties and perplexities rather to be expected in a new legislative venture than in a measure whose purpose is elucidation and consolidation. In particular, sec. 4 of this Act appears to have simply added to the general powers conferred on trustees by sec. 2 of the Trusts Act, 1867, those special powers which might have been granted to trustees by the Court under sec. 3 of that Act. Interesting questions arise from the fact that those special powers are no longer to be exercised under authority of the Court, but, with the general powers, now rest on the responsibility of the trustees and those dealing with them in determining whether or not they are at variance with the terms and purposes of the trust, while the effect of their exercise is no longer that of an act done under judicial authority, but is as if such powers had been contained in the trust deed.

Sec. 4.—"In all trusts the trustees shall have power to do "the following acts where such acts are not at vari- "ance with the terms or purposes of the trust, and "such acts, when done, shall be as effectual as if "such powers had been contained in the trust deed, "viz.:—"

(*a*) To sell,

(*b*) To feu, &c.

The powers of a father as tutor and administrator-at-law of his pupil child do not at common law include a power to sell his child's heritage. A father and administrator-at-law could

not have applied under the repealed Trusts Acts for power to sell his pupil child's heritage. His proper course was to appeal to the *nobile officium* of the Court of Session for such power (*Logan*, 1897, 25 R. 51); and similarly for power to feu (*Lord Clinton*, 3 R. 62). Whether such powers are conferred on him by sec. 4 of the Act of 1921 depends upon whether a father *qua* tutor-at-law is a trustee in a trust in the sense of that section. When we turn to the definitions in sec. 2 we find that, although "trustee" means and includes "any tutor," yet a father *qua* tutor-at-law is not a trustee *in any trust* in the sense of the Act.

It is clear that the ambit of the conferment of powers in sec. 4 is limited by the opening words of that section to apply only *in all trusts*. From the definition section, again, we find that—

> "'Trust' shall mean and include—
>
> "(*b*) The *appointment* of any tutor . . . *by deed, decree, or otherwise.*"

But a father is not tutor-at-law of his child by virtue of any appointment. There is no office to which he has been *appointed*, as there is none from which he can be removed. Where a pupil, with his bankrupt father's consent, asked the Court to remove the father from the office of administrator-in-law for his son, the Court appointed a *curator bonis*, but refused to remove the father. Lord Justice-Clerk Inglis said—"There appears to me to be no room for removing him from the office of administrator-in-law to his son, for there is no such office in the proper sense of the term. It is a position inseparable from the relation of parent and child, and recognised by the municipal law of the country, and all, therefore, that the Court can do is to supersede him in the exercise of his powers derived from that relation, but not to deprive him of any office" (*Robertson*, 1865, 3 M. 1077, at 1079).

Even if there can be said to be an *appointment* of a father as tutor-at-law of his pupil child, can such appointment be said to be by deed, decree, *or otherwise?* Primarily an *appointment otherwise* in this connotation would refer to an appointment by a writing, not being a deed or a decree, *e.g.*, by a holograph writing. Or it might, for instance, refer to the provisional appointment of tutors by deed of a mother to act jointly with the father, which becomes good when confirmed by the Court under sec. 3 (2) of the Guardianship of Infants Act, 1886, which is thus an appointment by deed *plus* decree, and therefore otherwise than by deed *or* decree. If "deed, decree, or" is not to be regarded as limiting an *appointment otherwise* to

one *ejusdem generis*, with appointments by deeds and decrees, then it is difficult to give any rational meaning to the statutory limitation of the mode of appointment contained in the words "by deed, decree, or otherwise," which would then require to be read out.

Moreover, the context of sec. 4—so far from requiring a construction to be put upon "trust" other than that which the definition section says "trust" shall mean and include, *i.e.*, an appointment by deed, decree, or otherwise—appears to assume the existence of a "trust deed," *i.e.*, some decree, deed, or other writing appointing a tutor (sec. 2). For the measure of the effect of the powers conferred by sec. 4 is described "as if such "powers had been contained in *the* trust deed." Further, the condition of the grant of powers in sec. 4 is that they be "not "at variance with the terms or purposes of the trust." All this is language singularly ill chosen if intended to apply in the case of a father acting as administrator-at-law for his pupil child. His power as such is not derived from any appointment, —certainly not from any appointment in the nature of a deed or decree –the purposes of his administration are not contained in any writing, and there is no trust deed into which such powers could be read.

If sec. 4 confers no powers on the father acting as administrator-at-law of his pupil child, what is the position of the mother who on the father's death becomes sole tutor of the pupil child by virtue of sec. 2 of the Guardianship of Infants Act, 1886? The true effect of that section seems to be that the powers that inured to the father from the relationship of parent and child, on his death inure to the mother from the same relationship. It makes no difference from the point of view of the Trusts Act that the powers thus inuring to the mother owe their origin to statute instead of to the common law. For the only statutory trusts specially provided for by the Trusts Act of 1921 are those created by private and local Acts of Parliament, and not by the public general statutes.

Although a father as administrator-at-law of his child has no power to sell his child's heritage, the Trusts Act purports to enable him to confer such a power on others by appointing tutors to such child by deed. Where under sec. 2 of the Guardianship of Infants Act the mother acts jointly with the tutor appointed by the father, the curious position arises of the child having joint tutors, one of whom may have power to sell heritage, while the other has not. Similarly, where under sec. 3 (2) of the Guardianship of Infants Act the Court confirms the mother's provisional nomination of a tutor to act jointly

with the father after her death, the mother's nominee may have power to sell while the father himself has not. But even the position of tutors appointed by deed, decree, or otherwise is, under sec. 4 of the Trusts Act, unsatisfactory. The existence of a power of sale in any given trust is uncertain, for it is made to depend on the question whether or not the sale is "at "variance with the terms or purposes of the trust." The purchaser in these circumstances is put under the necessity of assuring himself as to the purposes of the seller's trust on pain of the disposition being invalid from want of power to grant it, and so open to challenge beyond the *quadriennium utile*. How is the purchaser to assure himself of the purposes of the trust affecting the seller? Even where there are no conventional purposes, the situation is not clear. One of the duties of a tutor is to preserve his estate for the pupil. Sale of his heritable estate is presumed to be to the lesion of the pupil, and consequently at variance with the purposes of the tutory. Wherever, therefore, a tutor—in reliance only on the power of sale conferred by sec. 4—sells, it would appear that the sale is invalid, as being without power wherever it is open to reduction on the head of minority and lesion. So that if the disposition following on the sale went unchallenged during the *quadriennium utile*, it would still be open to reduction thereafter on the ground that it was granted without power. The pupil is thus enabled to challenge dispositions granted by his tutor, and that at any time until a title has prescribed against him under sec. 34 of the Conveyancing Act, 1874. It seems a curious result that the Trusts Act should in effect extend the *quadriennium utile* to a period of at least twenty years. So far, therefore, as sec. 4 purports to confer power of sale on tutors appointed by deed, decree, or otherwise, it cannot safely be taken advantage of.

That being so, the Act of 1921 has virtually and in practice perpetuated the position in which matters stood under the Trusts Amendment Act, 1884, which by sec. 2 enacted that in the construction of the Trusts Act, 1867, "trust" should include the appointment of any tutor by deed, decree, or otherwise, and "trustee" should include tutor. Under sec. 3 of the latter Act, as construed by the former, a tutor appointed by deed, decree, or otherwise, on showing that the sale of his pupil's heritage was expedient for the execution of the trust and not inconsistent with the intention thereof, could obtain from the Court authority to sell. On receiving such authority from the Court a tutor was in this position (1) he had an undoubted power to sell, and his disposition was validly granted, though

subject, it might be, to reduction on the head of minority and lesion within the *quadriennium utile*; and (2) he had satisfied the Court, *ex parte*, no doubt, that the sale was expedient and in the pupil's interest, and so had placed an obstacle in the way of any reduction on the head of minority and lesion. Now such tutors may obtain authority to sell by applying under sec. 5 of the Act of 1921. They require to satisfy the Court that the sale is expedient, and are therefore in the same position as they were under the repealed Trusts Acts.

Although tutors appointed by deed, decree, or otherwise may apply to the Court under sec. 5 of the Act of 1921, the father or mother, who might be supposed to be in a more favourable position, must still apply to the *nobile officium* of the Court for power to sell. It would appear that the Court will not exercise its *nobile officium* to grant power of sale on being satisfied merely that sale is expedient. The rule laid down in *Colt* v. *Colt*, M. 16387, and adopted by Lord President Inglis in *Lord Clinton*, 3 R. 62, and in *Campbell*, 7 R. 1032, was that applications to the *nobile officium* for powers to sell or to feu would not be granted unless the Court were satisfied of some urgent necessity for the step in order to avoid loss, it not being enough that the fact of granting the power would procure advantage to the estate. In the case of *Logan*, 25 R. 51, where the Court exercised its *nobile officium* to give a father power to sell his pupil child's heritage, Lord President Robertson described the case as being very near the border line. The facts there show that the necessity of sale was urgent enough, but it was a question whether a sale could save anything for the pupil whose heritage was burdened by a bond of practically equivalent amount with interest accruing and in arrears. But a power to sell granted in the exercise of the *nobile officium* is not an absolute protection to the tutor against subsequent responsibility (see observations of Lord Deas in *Lord Clinton* and of Lord President Inglis in *Campbell*, *sup. cit.*).

Where a power of sale granted by the Court under the repealed Trusts Acts was exercised by the tutor appointed by deed, decree, or otherwise, such sale did not necessarily operate conversion of the pupil's heritage in his succession. This was accepted by the Court in *Brown's Trustees* v. *Brown*, 24 R. 962, where a factor *loco tutoris* obtained a power of sale in the Sheriff Court and sold. There the pupil, on attaining the age of fourteen, had by will assigned to his next-of-kin the price of heritage which his tutor had sold. He died before attaining majority, and his will was given effect to as a bequest of

moveable estate. But the conversion was operated not by the sale by the pupil's tutor, but by the minor's implied intention. Lord Adam, who delivered the only opinion, said—"Now, I "think that if William had died intestate, the proceeds of the "sale being the *surrogatum* for heritable estate belonging to "the pupil sold during his pupillarity would have gone to "his heir-at-law. The sale was not a compulsory sale. I do "not in the least doubt that the sale was a most expedient act "by the tutor in the interest of his pupil, but, nevertheless, it "was a mere act of administration which it is quite settled "does not affect the heir's right of succession."

Where the power of sale is granted by the Court in the exercise of its *nobile officium—i.e.*, only on urgent necessity shown—would the sale by a tutor necessarily operate conversion as amounting to a compulsory sale? Erskine on this matter says—"Tutors cannot without weighty reasons change "the nature of any subject belonging to the pupil so as to "invert or alter the course of his succession; for over that "their office was never designed to give them power" (Inst. I., 7, 18). But the only "weighty reasons" referred to by Erskine and remaining in modern law are the compulsory sales of heritage spoken of by Lord Adam in *Brown's Trustees* v. *Brown*, *cit.*, by which is to be understood sales under compulsion of some general law.

The remaining question under this head is as to the effect of sales by tutors appointed by decree, deed, or otherwise under any power that may have been conferred on them by sec. 4 of the present Act. For that section provides that a sale in virtue of the powers it confers, is to be "as effectual as if "such powers had been contained in the trust deed." It is doubtful if the word "effectual" was meant by the draughtsman to refer to anything beyond the validity of the sale as being one with full power. It is just the word which the Act of 1867 applied to such intransitive acts of trustees as the appointment of factors, the discharge of resigning trustees, and the granting of loans. But inasmuch as the Act says the sale is to be "as effectual," when it might have confined itself to saying "as valid," as if the power had been contained in the trust deed, it may be that the intention is that the section should have effect beyond the mere validity of the sale, and that the sale should *in loco* change the nature of the pupil's property itself.

Where the tutor is appointed by decree a sale by him will have effect as if the power to sell had been contained in the decree. It will, therefore, be deemed to be a judicial sale, and

will not of itself convert the pupil's heritage. Similarly, perhaps in the case of a sale by a tutor nominate of his pupil's property acquired *aliunde*. That is, *e.g.*, where the father appoints the tutor, but the property has been acquired from an uncle. There the circumstance that the tutor's power to sell is deemed to be in the father's deed could scarcely influence the character of property which had never belonged to the father. For conversion always assumes intention to convert by an owner of the property. But where the property comes from the person appointing the tutor, the fact that such appointment is deemed to contain a power of sale might evidence an intention by the owner to convert, and on due exercise of the power conversion might be operated. But what if a father during life conveys heritage to his pupil child, and by will appoints him a tutor? How far will a power of sale deemed to be granted after the father had ceased to own the property avail as evidence of intention of an owner to convert? The most curious point that arises in this connection perhaps is in the case of the tutor appointed by the mother to act jointly with the father. Such an appointment is made provisionally by the mother's deed, and confirmed by decree of the Court. If the power of sale is deemed to be contained in the deed, the tutor may by sale convert, if in the decree he may not. It is a pity the Act is not more specific in its definitions.

A WIFE'S MATRIMONIAL TRUST PROTECTION.—II.

In this second article our first point is to justify the opinion stated in the previous article that the judge-made law of the inviolability of the wife's matrimonial trust protection has been badly made. We base that opinion on the First Division judgment in *Halkett*, 1891, 18 R. 615. That was exactly the kind of trust to which the doctrine of *Menzies*, 1875, 2 R. 507, applies, yet in the result the wife was done out of her protection, she was allowed to assign away her subsistence, and regret was expressed from the bench that care had not been taken to give her the real protection of an alimentary clause. It may be that such a clause without a trust must fail of effect, but conversely *Halkett* shows that the most solemn, irrevocable, undischargeable, antenuptial, contractual trust, without an alimentary clause, while it may be a mischievous obstacle in cases where no protection at all is required, will certainly fail of any substantial potency where protection is badly needed. The continued subsistence of the trust will be no consolation to the wife or widow who is deprived of all income from the trust by force of assignations, in security or absolute, granted

by her, it may be, out of favour for her husband or under his importunity. In *Halkett* the wife had concurred in her husband's borrowings to the effect of mortgaging her right to income from the trust under her antenuptial contract of marriage, and the mortgagees claimed payment of the whole income from the judicial factor. He resisted payment on the principle of *Menzies*, and this view was upheld in the Outer House by Lord Low. But the First Division, under Lord President Inglis, reversed, holding that *Menzies* had no application. By this was meant that in *Menzies* the attempt had been to upset and terminate the trust, whereas here the idea was (so it was said) the very opposite, namely, to recognise, continue, and act under the trust, but merely collecting the income by the hand of the wife's mandatary or assignee instead of on her own receipt each term. It was observed that the trust direction to pay to her could not possibly mean to pay to her only on her personal appearance. It would thus seem that the concern of the law is for the inviolability of the trust, and not of any protection to the wife. In the light of this a good deal of the argument in *Menzies* and the earlier cases quoted in the first article misses any effective point. Frankly, we do not understand a protection which does not protect; and a passage which we quoted from the Lord Justice-Clerk in *Pringle*, 1868, 6 M. 982, proves that he understood and meant that he was voting for a protection which should be virile enough to prevent prejudice to the wife's subsistence by any deed granted during the marriage. To the same effect Lord Moncreiff in *Menzies* said that the wife had during the marriage "no power to alienate" her provisions; and it is significant that so sound a lawyer as Lord Low was of opinion in *Halkett* itself that it must be either that or nothing. On these facts we repeat that this inviolability doctrine is a judge-made instrument, that it breaks down when put to the true test, and does so because it is badly made.

It is no real answer to say that if the right of assignment is recognised there can be no grievance, though revocation (if the term may pass) is disallowed as regards the trust itself. The answer is that a distinct pecuniary loss is always involved in transactions of that nature with assurance offices and other companies.

It is suggested that the distinction which is at the basis of the *Halkett* decision cannot be maintained under stress of circumstances. Thus, suppose the wife grants such securities as occurred in that case, and, as usual, containing power of sale. Default occurs, and the power of sale is exercised,

whereby X, the purchaser, acquires an absolute title to the wife's liferent interests, present and future. Suppose also that the fee is absolutely vested in ascertained persons, which might be the case. The position would then be that X and the fiars or fiar (and they might be one and the same person) would be *in titulo* to require the trustees to denude. We fail to see that anything that remains of *Menzies* would be an answer to that demand, and thus the trust would be at an end.

It must, however, be admitted that the doctrine of *Menzies* has become a favourite of the law, and that has led to extensions. Take, for instance, policies under sec. 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880. That section says that a policy effected by a married man on his own life, and expressed on its face to be for the benefit of his wife (here we refer to the wife only) shall be deemed a trust for her benefit, and the policy at once vests in the husband and his legal representatives in trust for the purpose expressed, or in any trustee nominated in the policy or separately. It has been decided that husband and wife together cannot grant a valid security over such a policy for borrowed money, even though no trustee other than the husband has been appointed (*Donald*, 1901, 9 S.L.T. 200). It is the trust that produces this result. Now, upon this there are a good many things to be said. Thus (1) it means that the inviolability doctrine is extended to post-nuptial provisions, for it will be observed that the section applies only to a married man. There may be supposed to be precedent for this in the cases of *Low*, 1877, 5 R. 185, and *Peddie*, 1891, 18 R. 491, but in both of these the interests of possible and probable issue were sufficient to justify the judgments. (2) Might it not be thought that such a case inclines rather to *Halkett* than to *Menzies?* (3) It is reasonably clear that the purpose of the notional "trust" was not to place the wife under any disability as regards the policy, but to exclude the husband's own debts and deeds. It must be remembered that the Act was passed in 1880, and it was not until the following year that the *jus mariti* was qualifiedly disestablished. (4) In the English Acts (Married Women's Property Acts, 1870 and 1882) the phraseology is substantially the same as in our 1880 Act, but this difficulty of title is not recognised in England. (5) It is difficult to reconcile this disability with the decision of the First Division in *M'Callum* v. *M'Culloch's Trustees*, 1904, 7 F. 337, where, under an antenuptial contract of marriage with an alimentary clause, protection to the wife was refused because the spouses themselves were a majority of the trustees, which, it was said, was in essence a fraud upon the idea of trust

protection. (6) Contrast those policies with policies effected under sec. 1 of the same Act, namely, policies effected by a wife on her own or her husband's life for her separate use. These latter policies vest in the wife, free from any right or power on her husband's part, and are assignable by her at pleasure without his consent. It is difficult to think that it was intended to create on the one hand a special disability in respect of policies effected by the husband, and, on the other hand, a special ability (as the law then stood) in respect of policies effected by the wife.

Turning now to the 1920 Act, the relevant provisions are—

1. The abolition of the husband's curatory of a major wife (sec. 2).

2. The abolition of the husband's right of administration (sec. 1).

3. The abolition of the power of revocation by the wife of donations made by her to her husband (sec. 5).

4. The grant to the wife of universal separate contractual capacity.

5. The provision in sec. 1 that "a married woman shall, "with regard to her estate, have the same powers of disposal "*as if she were unmarried.*" It will be observed that this does not say that she shall have the same powers of disposal of and regarding her estate as if she were a man, nor does it appear that the enactment is improved by the addition of the words with which sec. 1 closes, namely, "and any deed "or writing executed by her with reference to her heritable "estate in Scotland, or to her moveable estate, shall be as valid "and effectual *as if executed by her with consent of her husband* "*according to the present law and practice.*"

The 1st, 2nd, and 3rd of these changes have been briefly commented on in the first article in dealing with the legal grounds assigned for the judgment in *Menzies*, and they appear to have at least a tendency towards answering in the negative the question whether the principle of that judgment can survive. Then as to No. 4, the wife's new general power to incur obligations means that, even standing *Menzies*, and on the theory of *Halkett*, a holder of the wife's bond or bill can, without any assignment from her, put himself in possession of her "pro-"tected" trust interests by arrestment and furthcoming or by adjudication.

But the main interest centres in sec. 1 of the Act, and a careful consideration leaves one uncertain whether it materially advances the question beyond the position already conceded in *Halkett's* case. Thus, we think the decisions in *Menzies* and

the earlier cases would have been the same though the contracts of marriage had contained a renunciation by the husband of his *jus mariti* and right of administration, which appears to knock out the first of the three limbs of sec. 1 of the Act. In like manner, limb No. 3 goes by the board, for the whole point of the cases is that not even with the husband's consent can the wife terminate the trust, so that obviously the problem is not cleared by saying that the wife's deed, without her husband's consent, shall now be as valid and effectual as before the Act it would have been with his consent. Indeed, this superfluous addition to the section may serve as an argument of limitation on the suggestion that one is to read in the words "and no more "valid or effectual than." There remains limb No. 2 of the section, which is the brief enactment that "a married woman "shall, with regard to her estate, have the same powers of dis- "posal as if she were unmarried." It may be argued that this can have no application at all to a claim to end a matrimonial trust, for (1) such a position could not exist "if she were un- "married"; (2) that the trust constitution is not "her "estate"; and (3) that to end the trust is not "disposal." Obviously there is nothing in the section which will enable a married woman to get over an alimentary clause, but then her disability in that respect has no relation to coverture, for there she is in exactly the same position as an unmarried woman or a widow or any man.

The present articles were suggested by an inquiry from England whether it is really the law of Scotland that a wife is unable to deal with her interest in policies effected under sec. 2 of the 1880 Act. The suggestion of any such difficulty was viewed with the greatest surprise in England, seeing that that section was copied from the English Act of 1870, on which no similar trouble has arisen. Our own opinion is that the *Menzies* doctrine should never have been extended to these policies, that not having been the idea or intention of the 1880 Act. This we say in the absence from the policy of special clauses, which in our view may be competently, and sometimes beneficially, introduced. But as the cases stand no one can safely assume that such policies can be dealt with.

As regards proper matrimonial trusts, it is easy to make too much of what the problem is. In the first place, substantial power of alienation is conceded by *Halkett*. In the second place, the question cannot very well arise unless the fee is absolutely vested, and that does not often happen during the subsistence of the marriage in view of the unwillingness of the Court to assume the impossibility of further issue. In the third place,

an alimentary clause shuts the door, and in our opinion that is a "usual and proper" clause in such a settlement. But, after allowing for all these factors, a question does remain, and it may arise again as it did in *Menzies*. As things now stand, that question is whether, after the legislation of 1919 and 1920, any legal disability can attach to a woman during marriage, and simply by reason of it. It seems to us that there is now the strongest ground for suggesting a negative answer to that question.

LEGAL POINTS IN TAX CASES.

THE writer has had occasion to consider from time to time a number of income tax problems, and, looking over his notes, it occurs to him that a brief statement of these might be of practical service to the readers of the SCOTTISH LAW REVIEW.

Golf Club.—Entrance fees are part of general income. They are not capital. Visitors' fees are income, and taxable under Schedule D, case 1, or, alternatively, case 6 (*Carlisle and Silloth Golf Club* v. *Smith*, 1912, 2 K.B. 177).

Charitable Trusts.—Sec. 37 1 (*b*) of the 1918 Act exempts the income of a trust for charitable purposes. In *Special Commissioners* v. *Pemsel*, 1891, A.C. 531, education was held to be such a purpose, for the reason that the expression "charitable purposes" bears the same meaning in the Income Tax Acts as in the general law of England, and is not restricted to its ordinary or colloquial sense. See observations by Lord Macnaghten, at p. 583, as to what the term "charity" in its legal sense comprises.

Deficiencies, E.P.D.—The case of *Gittus* v. *Commissioners of Inland Revenue*, 1920, 36 T.L.R. 151, appears to decide *quoad* excess profits duty that claims for repayment are personal to the individual, *e.g.*, a surviving partner, can only get back his own share of excess profits duty overpaid by the firm, and an executor will not be given repayment against excess profits duty paid by a deceased.

Employees.—Is a deduction from Schedule E assessments of payments to a superannuation fund allowable?—It is not (*Hudson* v. *Gribble*, 1903, 1 K.B. 517). Sec. 32 of the 1921 Act now gives an allowance for contributions of employers and employees to a superannuation fund. Payments or deductions to provide, not for the employed persons, but for their widows and children, are already exempt under sec. 32 of the 1918 Act.

Compound Interest.—In *Morris-Mayhew* v. *Halton*, 1921,

L.J.Ch. 53, the point raised was whether, in cases where a mortgage deed provides for compound interest on the principal debt, with annual rests, income tax is to be deducted before payment of the amount found due for compound interest. Following the case of *Re Craven's Mortgage—Davis* v. *Craven*, 1907, 2 Ch. 448, it has been decided that the mortgagors are entitled so to deduct income tax.

Sale of Shares.—Generally speaking, a profit made on realisation of shares is not taxable unless the seller carries on a business of dealing in shares. If a loss had been made on the shares, an allowance for it would have been refused. *Stott* v. *Hoddinott*, 1916, Tax Cases, 85, laid down that losses on shares taken up by an architect in order to get business could not be allowed, and *Hudson's Bay Company* v. *Stevens, &c.*, 1909, 5 Tax Cases, 424, ruled that liability cannot exist unless there is " trading " in the item giving the profit. The principle is clear, but the line in practice is difficult to draw; but see *Tebran Rubber Syndicate* v. *Farmer*, 1910, 5 Tax Cases, 658.

Capital.—In *English Crown Spelter Company* v. *Baker*, 1908, 5 Tax Cases, 327, it was held that capital in the Income Tax Acts must be interpreted in the meaning understood in " common parlance," *i.e.*, commercially.

A Limited Company, E.P.D.—A company cannot be liable where an individual carrying on the same class of business would not be liable. Cases of *Korean Syndicate*, 1920, 36 T.L.R. 179.

Separate Assessment.—A company producing raw material and one manufacturing it do not carry on the same trade (*Dunlop Rubber Company's* case, 1919, 35 T.L.R. 432).

Gifts.—A collection made for the purpose of reducing a state of underpayment is not a gift. Apparently a gift should not have as its object the purpose of increasing remuneration (*Blakiston* v. *Cooper*, 1907, 2 K.B. 688). There the Lord Chancellor held that there would have been no liability had the sum in question (Easter offerings, an annually recurring sum) been a gift of an exceptional kind, such as a testimonial or a contribution for a specific purpose, *e.g.*, to provide for a holiday, or a subscription due to the personal qualities of the particular clergyman. Lord Ashburn observed that Easter offerings are not wholly marks of esteem and respect!

Penalties.—There can be no proceedings for penalties if the deficiencies alleged were *bona fide* errors. Fraudulent intent is essential (*Attorney-General* v. *Till*, 1910, A.C. 50).

Manual Workers' Travelling Expenses.—The war-time

concession under which manual workers earning weekly wages could claim an abatement for travelling expenses, is now, we understand, withdrawn.

THE PLEADER.

In *Galbraith & Grant, Limited* v. *Block*, King's Bench, 26th May, 1922, an action for the price of goods sold and delivered, the County Court judge had held that there had not been delivery because the defendant himself or some person authorised by him had not received the goods. It was held on appeal that this was too narrow a view of the law; the proper issue was whether the carrier had taken proper care to see that the goods were not handed over to an unauthorised person, and the case was sent back for a new trial on this question alone, which did not seem to have been considered by the County Court judge. We notice the case here for the important practical rule which the Appellate Court laid down to the effect that where goods are entrusted to a carrier who is the agent of the seller there is delivery to the purchaser where there is delivery at his address, even if they are received by an unauthorised person and misappropriated, provided that the carrier has exercised proper care in seeing that no unauthorised person received them.

In view of the vast increase in mechanical haulage, it is probable that road authorities will have to consider more closely than ever before the question of claims against users for extraordinary traffic damage. The recent case in England of *Weston-super-Mare Council*, 1921, 65 S.J. 680, and the lately decided Scottish case, *Glasgow Corporation* v. *Barclay, Curle*, 1922, 1 S.L.T. 325, will form leading cases in this connection. In the former the plaintiffs were suing (*a*) for damage done to their roads by extraordinary traffic within the meaning of the Roads and Bridges Act of 1878, and (*b*) for damages at common law. Their claim under the former head was sustained, but disallowed on the latter. In the Scottish case, as the statutory remedy did not apply to Glasgow, only the common law position was in question, and the decision here was in favour of defenders.

In the Scottish case the road authority's claim was based on negligence—"the pursuers having suffered loss and damage "through the fault of the defenders as condescended upon, and "to the extent sued for, decree should be granted as concluded "for." In England the common law case was laid on nuisance, which with reference to highways is defined (Pratt and M'Kenzie on Highways, p. 116) as "any wrongful act or "omission upon or near a highway, whereby the public are

"prevented from freely, safely, and conveniently passing along "the highway." Obviously a case based on that principle would have an easier course than one laid on negligence. In Scotland, however, there is a remedy for "nuisance"—interdict or damages, or both—even where no negligence is alleged, but just the commission of an act itself illegal.

In *Edwards & Co.* v. *Motor Union Insurance Company* (*The Times*, 25th May), the right of subrogation was claimed in the following circumstances:—The plaintiffs had taken out with the defenders a p.p.i. policy, covering freight and chartered freight, for twelve months. The ship was sunk in collision with another vessel, the latter being found entirely to blame. The defendants paid to the plaintiffs £1870 as their proportion of the loss on chartered freights. The owners of the vessel in fault paid £43,000 to the plaintiffs, of which £1416 was in respect of loss of chartered freights. The defendants claimed to be subrogated to the rights of the plaintiffs over this last sum to the extent of £295, their proportion of the amount. Mr. Justice M'Cardie held that a p.p.i. policy is not a contract of indemnity, but a mere bet, and therefore cannot give rise to any claim that the underwriters shall be subrogated to any rights of the assured.

In connection with the doctrine of invitation (to children) by allurement as developed in *Cooke* v. *Great Western Railway Company*, 1909, A.C. 229 (railway turntable case), and *Taylor* v. *Glasgow Corporation* (poisoned berries case), we are interested to see a decision of the Supreme Court of the United States practically in agreement, though differing in result to the claimant (*United Zinc and Chemical Company* v. *Britt*, 27th March, 1922). Buildings in which sulphuric acid and zinc spelter had been made had been dismantled, and on the ground surface water had collected in shallow pools. This water had become poisoned by sulphuric acid and zinc sulphate that had come in one way or another from the works. Two boys, eight and eleven years of age, members of a camping party, came upon the premises, went into the water, and were poisoned and died. At the trial the judge instructed the jury that if the water looked clear, but in fact was poisonous, and thus the children were allured to it, the landowner was liable. The jury gave a verdict in favour of the claimant, and this was upheld by the Court of Appeal. The Supreme Court has reversed this judgment, Mr. Justice Holmes giving the considered opinion of the Court, from which we excerpt the following dicta:—

"If the children had been adults they would have had no "case. They would have been trespassers, and the owner of

"the land would have owed no duty to remove even hidden "danger; he would have been entitled to assume that they "would obey the law and not trespass . . . Infants have "no greater right to go upon other people's land than adults, "and the mere fact that they are infants imposes no duty "upon landowners to expect them and to prepare for their "safety." On the other hand, the duty of one who invites "another upon his land not to lead him into a trap is well "settled, and, while it is very plain that temptation is not "invitation, it may be held that knowingly to establish and "expose, unfenced, to children of an age, something that is "certain to attract them, has the legal effect of an invitation "to them, although not to an adult . . . In the case at bar "it is at least doubtful whether the water could be seen from "any place where the children lawfully were, and there is "no evidence that it was what led them to enter the land. "But that is necessary to start the supposed duty. There "can be no general duty on the part of a landowner "to keep his land safe for children, or even free "from hidden dangers, if he has not directly or by "implication invited or licensed them to come there ". . . It does not appear that children were in the habit "of going to the place; so that foundation also fails . . . "The decision is very far from establishing that the petitioner "is liable for poisoned water not bordering a road, not shown "to have been the inducement that led the children to tres- "pass, if in any event the law would deem it sufficient to "excuse their going there, and not shown to have been the "indirect inducement because known to the children to be "frequented by others."

Literature.

A HANDBOOK OF HUSBAND AND WIFE ACCORDING TO THE LAW OF SCOTLAND. By Frederick P. Walton. Second Edition, revised and partly re-written by John L. Wark, K.C., Sheriff of Argyll. Edinburgh: W. Green & Sons, Ltd. (31s. 6d.)

Professor Walton's familiar handbook, which appeared in 1893, has provided a generation of students and lawyers with a lucid and manageable re-statement of this important branch of the law. But thirty years must be near the limit of usefulness of a legal text-book, particularly if these years have witnessed not merely the inevitable accumulation of decisions, but also such a revolution in fundamental ideas as has been reflected in recent legislation affecting the personal and patrimonial relationship of husband and wife. The appearance of this new edition is thus all the more welcome because belated. The editor has brought to his arduous task the meticulous

care of the exact student and the breadth of outlook of the experienced practitioner; he has evidently stipulated for an unlimited discretion, but even a cursory perusal of the volume is sufficient to reveal how judiciously that discretion has been exercised. While utilising Professor Walton's foundations wherever possible, Mr. Wark, in addition to contributing much new matter, has not hesitated substantially to recast—and in every case to improve—the arrangement of the topics, in which respect the first edition was open to obvious criticism. Where all is good, it is invidious to particularise; but the section of the work which stands out as an admirable example of clear and concise exposition is that which is devoted to private international law—a region in which accurate appreciation of principles is never easy, and seldom attainable without either exhaustive and perilous research, or else the reliable guidance which such a book as this affords. Mr. Wark has earned the gratitude of the profession, and not least of those who, having been brought up under the old *régime*, find themselves all too apt to overlook or misunderstand the sweeping changes which recent statutes have introduced into old-established legal conceptions.

The Hague Rules, 1921. Explained by Sandford D. Cole. Second Edition. London: Effingham Wilson. (5s. net).

We reviewed the first edition of this little book in our January number. Mr. Cole has taken the opportunity of the call for a second edition to discuss the objections that have been stated to certain of the rules, and to include in the notes to the various rules the relevant cases that have been decided since the rules were issued. He has added the French text of the rules, the text of the Harter Act, and the text of the Canadian Water Carriage of Goods Acts, 1910 and 1911. It is a very thorough piece of work.

The International Law Association has just issued its report of the meeting at The Hague, including a separate volume giving the proceedings of the Maritime Law Committee which framed the rules.

Obituary.

At Oban, on 6th May, Mr. Donald MacGregor, aged seventy-nine. Born near Oban, he was apprenticed to the late Mr. Duncan Clark, solicitor, Oban. He started business on his own account in Oban about fifty years ago, and at his death was the senior legal practitioner of the town. He was clerk to several local School Boards in the district, and was Dean of Faculty of Procurators for a number of years.

At Dundee, on 22nd May, Mr. David Stewart, aged eighty. Mr. Stewart, who was the oldest practising member of the Dundee Faculty of Procurators, was a native of Dundee, and

spent all his professional life of fifty-six years in that city. He was unmarried.

At Glasgow, on 25th May, Mr. Nicol Ferguson Cameron, of Messrs. Clark & Cameron, solicitors, Glasgow. A native of Greenock, Mr. Cameron was a prominent figure in legal and business circles in Glasgow. He was for a term chairman of the Glasgow Conservative Club.

At Cumnock, on 27th May, Mr. James Boyd, aged forty-nine. Mr. Boyd was admitted a member of the Faculty of Procurators in Glasgow in 1900, and was a partner of Messrs. Boyds, Miller, & Thompson, solicitors, Glasgow.

Notes from Edinburgh.

PARLIAMENT HOUSE, 31*st May*, 1922.

WITH a bench fully manned, the Court embarked on the summer session on Friday, 12th instant, and, while the many indefatigable rumourists who had been sending round the tale concerning a certain judicial resignation may have been taken aback for a little while, they soon put themselves right with themselves and neighbours by explaining that, naturally, the alleged resignation would not take effect until October next. The persistently repeated rumour concerns an Inner House judge who has by long service earned a full pension, which circumstance, taken into consideration with other indications, has given the air of substance to the story. It may here be said that, as mentioned in last month's Notes, there is strong ground for belief that a resignation may shortly be looked for, and political experts have been discussing for some time past the possibility of a bye-election in South Edinburgh, the seat held by the Lord Advocate, whose early elevation to the bench is expected. The Solicitor-General, Mr. Constable, K.C., would in that event naturally succeed to the higher position.

The unanimous election of Mr. Condie S. Sandeman, K.C., to the dignified office of Dean of Faculty will, if the example of his immediate predecessor be followed, mean his vacating office as Sheriff of Perthshire, though it is true that there have been instances of dual positions having been held, these being of ancient date, the recent instances being due to special circumstances, when Lord President Clyde, as Lord Advocate, continued to officiate as Dean as a war-time expedient, and when the present Solicitor-General continued in office until his successor was elected. Perthshire, the premier county, has been fortunate in the Sheriffs appointed of recent years, and the people of the county

are known to take a friendly, if critical, interest in those sent to rule over them. As the present Sheriff is himself a son of that county, there would be feelings of regret entertained at having to part with him after a comparatively short spell of duty. As there is no definite rule of etiquette in this matter, the creation of any vacancy seems to be unnecessary.

The spring vacation would seem to have been utilised by many agents for preparation of an anti-printing campaign, for, from the word "go" when the Court assembled, both Divisions of the Inner House have had a series of applications made to have the printing of notes of evidence and other appendices in appeals and reclaiming notes dispensed with, and in the majority of cases, so far, the applications have been favourably considered. A certain modern process of typewriting multiple reproduction which Mr. Fred Macquisten, K.C., M.P., has done a lot to bring to the notice of local solicitors has been examined from specimens by the judges, and actually a demonstration of the working of the process has been given for the instruction of our senators; and it will be a feather in Mr. Macquisten's cap if a wholesale adoption of the system leads to a cheapening of litigation, with the resultant benefit of increased custom being bestowed on this languishing institution. So far, it has not been found necessary to pass any Act of Sederunt, for it is understood that each application to have printing dispensed with is to be judged on its own particular merits; but an Act of Sederunt would not come amiss, dealing with the whole subject of printing in the Court of Session, for there are many economies, small, it may be, but well worth considering, which might be effected. For example, the printing of records for Outer House judges might be made optional, for, except for a possible reclaiming note, there seems to be no good reason why an Outer House judge should be put on a different plane from that of a Sheriff-Substitute or a Sheriff. The question of reclaiming would, of course, have to be considered, because printing of a record would in such event be necessary, yet less than 50 per cent. of the Outer House judgments are reclaimed against, and, in any case, for litigants who determine to seek a higher Court judgment the item of printing a record is a small one.

Within an hour prior to his demitting office as Dean of Faculty, the Solicitor-General performed the graceful task of welcoming and escorting through Parliament House His Grace the Lord High Commissioner to the Church of Scotland, who, with the Duchess of Sutherland and attendant ladies, paid

a friendly sight-seeing visit to our legal sanctuary. The Commissioner's status is Royal only *quoad* the Church, and the visit was not made in any official capacity. But it is interesting to contemplate what would happen were a Royal visit to be made to our law Courts, and what sort of etiquette would be observed in such event, for the Sovereign, being the fountainhead of justice in our land, would be entitled to sit in the seat of supreme honour, viz., the chair of the Lord President, who would take his seat on the right hand of His Majesty. Royal visits to our out-of-the-way establishment are, however, unknown, and are likely to remain so.

The tentacles of the English legal system, civil and criminal, are certainly of greater length and elasticity than are the organs of the sort owned by our Scottish system, and the expression " the long arm of the law " is well exemplified by the boundless jurisdiction now being exercised in the south. We have had some experience of the attempt to create jurisdiction against a Scottish defender by personal service in this country of an English warrant to arrest for a civil debt endorsed by an obliging rural justice of peace, and executed by a rural police constable, in which case suspension and liberation were granted by Lord Ashmore before the minions from the south had dragged their intended victim across the Border. This doctrine of personal service is a great scheme, and is capable of world-wide application. Then our Scottish idea as to crime in one aspect is that the law of the land wherein a crime is committed must maintain its majesty by punishing the perpetrator of that crime, if duly tried and found guilty. Bigamy is a crime in civilised countries, including France, and while an English officer who committed the crime in France was liable to trial in that country, the laws of England are wide and active enough to provide for his trial and sentence in England, a plea of guilty having been given. Our Scottish irregular marriages have been the theme of wonderment to our English brethren, few of whom attempt to understand the mysteries thereof, but, nonetheless, the English Courts have got the machinery, the nerve, and the jurisdiction to judicially entertain an action for declarator of nullity of a Scottish irregular marriage because of the allegation made that the ceremony of declaration before witnesses was fraudulent, in respect that neither party had resided for twenty-one days in Scotland, and that the witnesses were believed to have committed perjury, the fact being still in doubt whether any oath had been administered, and, if so, by whom. Late in the day we learn from the

newspapers that some suspicion has struck somebody that a Scottish Sheriff may have had some hand in the irregular nuptials, and complaint has been made to the judge investigating the case that a sheriff-clerk has declined to give information to plaintiff's solicitors. That sheriff-clerk, if the Scottish Courts lend countenance to an application for his citation as a witness, will, of course, have to obey as a witness to speak to certain facts, but he cannot be expected to provide information in the loose and general way which the practitioners in the south seem to expect. With the evidence of a Scottish advocate who has not practised here, but has for over twenty years past been residing in London as a barrister, the counsel and judge seem to have got some sort of idea as to what happens when a marriage by declaration here is gone about, but as yet they do not seem to have grasped the fact that the parties invariably go before the Sheriff to be convicted, and that the extract of the friendly conviction goes to the Registrar of Marriages. It may be asked, is an ill-informed English Court a proper forum for a declarator of nullity of a Scottish irregular marriage? It might happen that the parties had no Scottish domicile at the start, but yet lived in Scotland, and constituted by habit and repute, a Scottish marriage after having gone through the ceremony alleged to have been illegal. And, assuming the registrar did register the irregular marriage, is he bound to obey an English decree of annulment? It does not follow that what would satisfy an English Court as to the status of parties would satisfy a Scottish Court, and a registrar would be within his rights in refusing to mark as matter of course on his register any decree of nullity granted by a foreign Court.

Not at all encouraging are the figures applicable to the new business coming into the Court, for in both Inner House and Outer House the figures are poor even for these dull times. For the past month the gross total of cases received in the Inner House is 53, and 33 represent the vacation accumulations, leaving 20 brought into the two Divisions between 12th and 31st May. The First Division's share of the 53 is 35, made up of 19 reclaiming notes, 8 appeals, 3 stated cases under the Workmen's Compensation Act, 3 remitted causes for jury trial, and 2 Exchequer appeals; and the balance of 18 received in the Second Division is composed of 4 reclaiming notes, 8 appeals, 4 special cases, and 2 remitted causes. In the Outer House there were 137 new summonses called during May, which includes the callings on first sederunt day, being vacation summonses received since second

box-day, and of the 137 there are 58 consistorial causes. Lord Ashmore heads the list with 42, of which 16 are divorces; Lord Anderson has 40, there being 21 divorces, 1 separation and aliment, and 1 adherence and aliment; Lord Sands also has 40, of which 17 are divorces; Lord Blackburn has 8, none being consistorial; and Lord Morison has 7, there being 2 divorces among them.

Notes from London.

THE TEMPLE, 31*st May*, 1922.

THE public often take a keen interest in legal matters, but their interest is not that of the professional lawyer. A great legal change which affects the policy of the country for centuries is made with little comment from the outer world. Thus the man in the street most likely gave scant attention to the fact that the Law of Property Bill passed its second reading in the Commons on the 15th of this month. It is the most important legal event which has happened for a long period. It is as certain as anything of the kind can be that in due time it will be added to the statute book. It is the work of many hands; a succession of eminent Lord Chancellors have laboured at it, though the credit of its complicated provisions is mainly due to a number of workers, men of the highest ability yet bearing names not known beyond a limited circle. In moving the second reading the Solicitor-General, Sir Leslie Scott, referred to it as the biggest bill ever introduced into Parliament. It may be briefly described as an attempt to make the law of real and personal property identical, so that in future you may sell a house just as you would sell a horse. Obviously this can never be quite accomplished, because land has certain characteristics which no formula of the conveyancer can charm away, but a great deal can be done in that direction. The old system was described by Sir Leslie as "grotesquely complicated," and he had some bitter words for the "mystic formulæ of the conveyancer." Things in future are to be comparatively simple. In cases of intestacy women are to be in the same position as men; all the old, picturesque tenures which for centuries have been so marked a feature of English law are summarily abolished. Chief of these is the system of copyhold, so that practically the manor will become a thing of the past. Now, of old, the manor was a little kingdom in itself; it was governed by its own laws, for custom, according to the well-known rule, was the life of the manor. The Court rolls in which those customs

were recorded were thus of the utmost importance; through many centuries they were carefully preserved, and they still exist in great profusion throughout England. You find them in the offices of old country solicitors, who generally acted as stewards of the manor. Sales of land were effected by entries on the rolls; a copy of those rolls was your title, and so it was called copyhold tenure. As now there is only to be freehold and leasehold, those ancient documents will become of no value, and will gradually vanish, as is the way with things which it is no one's direct interest to preserve. With it will go the custom of gavelkind in Kent, said by immemorial tradition to have been won from the Conqueror immediately after the battle of Hastings by the men of that county, where it had already existed for centuries, and that of borough English, which gave the land to the youngest, and not to the eldest, son. This last custom appeared in the most extraordinary and arbitrary places, as, for instance, in the manor of Lambeth, Surrey, and in the manor of St. John of Jerusalem, in Islington. The antiquarian cannot but sigh at this extinction of the picturesque, whilst the business man will wonder why the reform was not made long ago. In truth, however, those changes look bigger on paper than they are in reality, just as in Scotland marriage by consent, without legal formula of any kind, bulks more in imagination and fiction than in fact, since the vast majority go to church, chapel, or registry office, so that only once in a blue moon is any other method adopted. So in both countries those who have property usually dispose of it by will, and thus leave no room for the customs which have here been set forth. In many cases the bill proposes to make an end of vested interests. Obviously it could not make so sweeping a change without considerable disturbance, but, of course, those interests have to be compensated, and a good deal of the bill is devoted to ingenious clauses providing the necessary machinery for this. The measure has been well received by the profession generally. It will certainly make conveyancing a comparatively simple matter. Will it make it much cheaper? asks the man in the street. The answer must be that it will tend in that direction, though to what extent the tendency will become accomplished fact time alone can show.

Among those almost unnoticed workers who helped to build up the huge fabric of the bill, one notes with melancholy interest the name of the late Mr. Justice Peterson, who devoted, we are told, the whole of one long vacation to a minute scrutiny of its provisions. He

died this month, at the comparatively early age of sixty-two years, the result of an illness brought on by a golfing accident. He had been one of the judges of the Chancery Division since 1915, and had won himself a name for quiet and conscientious work. It is a commonplace of the law Courts that the best judges are little heard of by the outside world. Like the ideal Roman matron, they are supreme within the circle of their own activity, and shun with something like horror the cheap notoriety obtained by presiding in sensational cases, or mixing themselves up in any outside public matter. This is especially true of the judges of the Chancery Division, whose work is obviously concerned for the most part with questions in which the outsider has no interest. The late judge was of Scottish origin; his father was a native of Shetland, who made a large fortune in Australia; he was thus able to give his son the best education available, and to start him at the bar under the most favourable auspices. It need only be said that he took full advantage of his opportunities. He is succeeded by Mr. Mark Romer, K.C., who has been for some time past a prominent figure in the Chancery Courts. A son of the late Lord Justice Romer, he will, there is every reason to believe, worthily sustain the family tradition.

The Armstrong case still continues to excite public attention. Armstrong, it will be remembered, was arrested on the last day of 1921 on a charge of attempting to murder, by arsenical poisoning, Mr. Martin, a fellow-solicitor with whom he was on terms of some professional and private intimacy. Then followed the exhumation of the body of his late wife, and his trial in April at Hereford Assizes, before Mr. Justice Darling, on the charge of poisoning her also by arsenic. He was convicted, and sentence of death followed. An appeal to the Court of Criminal Appeal was inevitable, the great question being, was it right to admit the evidence of the attempt to poison Mr. Martin as part of the proof that Armstrong had poisoned his wife by somewhat similar methods. Now, apart from statutory provisions, English criminal law only admits proof of facts directly bearing on the crime then being investigated; but it is undoubtedly the case that during the last seventy years a rule has grown up allowing proof of (1) similar acts to that of which the prisoner is accused, and (2) where the acts are capable of "sinister" or innocent interpretation, to bring evidence of previous "sinister" acts to show that here the innocent interpretation must be rejected. The most common illustration of the second of the above

classes is that of charges brought against surgeons of procuring abortion. If it can be shown that the accused surgeon has been in the habit of performing operations on pregnant women, and that the result of these operations has been to bring about miscarriage, then it tends to show that the operation then being investigated could scarcely have been of an innocent character. All this exhibits a change from the practice of an earlier period. In 1856 the notorious Palmer was convicted at the Central Criminal Court before Lord Chief Justice Campbell of murder by the administration of strychnine. The prosecution had ample evidence that he had been engaged on what one might call the same game for some time previously, but not the least evidence was offered at the trial of any of these other cases. The late Mr. Justice Stephen, a very eminent criminal authority, has commented on this with approval as showing the high standard of proof required by English law and the manner in which the rule was observed; but these later cases have undoubtedly modified the law, and the dismissal of Armstrong's appeal would seem to confirm emphatically the newer method. After all, the object of criminal law must be the detection of the guilty, and if crime is more likely to be detected by the newer system, then let that system be followed. Mr. Justice Stephen was not without insular prejudices. In the course of an elaborate examination of a famous French criminal case, he made some very scathing remarks on the methods pursued by our neighbours in their murder trials, but we need not adapt a whole system because we pick out parts of it that seem to fit well into our own, as seems to be the case here. Lord Hewart, in giving the judgment of the Court dismissing the appeal, said that there was ample evidence to convict even if the Martin incidents were entirely excluded. This, however, would be a dangerous doctrine, because one could never tell how far evidence—afterwards found to be improper—had weighed on the minds of the jury. Throughout the case was contested in a most able manner; it has consolidated the reputation of two eminent lawyers. The Attorney-General, Sir Ernest Pollock, was well known as accurate, painstaking, and acute, but even his admirers were not prepared for the ingenuity and chastened eloquence with which he conducted the prosecution. The Pollocks have long had a great reputation in English law, and the worthy saddler of the Barbican, when he set forth from his Scottish home, well over a century ago, to try his fortunes, like so many of his predecessors and successors, in the land of promise in the south, can scarcely

have dreamed that his descendants were in no great distance of time to succeed to such high place. A great name is both an advantage and a disadvantage. The holder may use it to conceal his own deficiencies and to acquire honours which he would never have gained from his own merits. In the end he will be looked upon with something of contempt. On the other hand, if he is fit, he may add lustre to an already famous house. One may with some assurance predict that this will be the fortunate lot of the new Attorney-General. The defence of the prisoner was chiefly in the able hands of Sir Henry Curtis Bennett. It has raised him to the first rank of criminal lawyers. In fact, since Sir Ernest Wild has been made Recorder of London, and Sir Edward Marshall Hall is much engaged in other fields (not to mention the sale of snuff-boxes), Sir Henry stands almost alone. His argument before the Court of Criminal Appeal for two days on end was a veritable *tour de force*. He was continually interrupted by searching questions from one or other of the able judges before whom he was pleading, but he had always his answer ready, and his answer was always to the point. No one grudges his success. His genial manner and complete absence of "side" have endeared him to his brethren at the bar; there is no man more popular or more deserving of his popularity.

NOTES OF ENGLISH CASES.

THE following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

82. Sale by auction—warranty. The conditions provided "sale with all faults, but returnable within eight days." A cow sold under these conditions died from having swallowed a piece of wire before the sale. It was not returned within eight days. *Held* no claim. *Frankland* v. *Smith*, C.A. 15th March.

83. C.i.f. contract—through bills of lading. Guano was shipped from Norway to Hamburg, dated 22nd April, 1920, and then transhipped into a Japanese steamer under a bill of lading dated 5th May, 1920. *Held* that the latter bill of lading was of too late issue, and was a bad tender. *Hansonn* v. *Hamel & Horley, Limited*, H.L. 16th March. 38 T.R. 466.

84. Excess profits duty—change of ownership—Finance (No. 2) Act, 1915, secs. 38 (1) and 45 (2). The commissioners may assess the person who was carrying on the business at the time the assessment was made, though they might, under sec. 45 (2), take the accounting period ending on the date on which the ownership had

changed, and assess the duty on the person who at that time carried on the business. *Wankie Colliery Company* v. *Commissioners of Inland Revenue*, H.L. 17th March. 38 T.R. 470.

85. Increase of Mortgage Interest (Restriction) Act, 1920, sec. 7—injunction to restrain sale by mortgagee on the ground of disrepair. *Held* that the plaintiff had not fallen short of the standard of repairs required by sec. 7, and injunction granted. *Woodifield* v. *Bond*, Ch.D. 22nd March. 38 T.R. 494.

86. Resealing of probate—Government of Ireland Act, 1920—Colonial Probates Act, 1892. *Held* that a probate issued in Belfast was to be resealed in England under the Probate (Ireland) Act, 1857, and the first Act, *supra*, *re Robert Gault, deceased*, P.D. 24th March. 38 T.R. 499.

Note.—This will apply to resealing in Scotland.

87. Defence of Realm Act, regulation 39 BBB. The naval transport officer in October, 1920, detained a ship for eighteen days on account of the coal strike. The suppliants as time charterers claimed compensation. *Held* (*a*) that there was no implied contract for compensation; (*b*) that any claim under the Indemnity Act, 1920, sec. 2 (1) (*b*) should be reserved. *Federated Coal and Shipping Company, Limited* v. *the King*, K.B.D. 24th March. 38 T.R. 497.

88. No. 135, vol. xxxvii. 37 T.R. 579, affirmed. Marine-valued policy construed as a sterling policy and not as a dollar policy. *Howard Houlder* v. *Union Marine Insurance Company, Limited*, (H.L.) 27th March. 38 T.R. 515.

89. Statutes of limitations do not run against the Crown unless expressly included. Maritime Conventions Act, 1911, sec. 8. "*The Loredano*," P.D. 27th March. 38 T.R. 516.

90. Gaming Act, 1835, sec. 2—action for repayment of betting cheques. Defence—set-off of cheques not cashed but returned in payment of bets lost by bookmaker. *Held* not actual payment, and defence repelled. *Malone* v. *Powell*, K.B.D. 26th April.

91. Income Tax Act, 1842, sec. 105, rule 3, Schedule C—Income Tax Act, 1918, sec. 37—charity A assigned a sum to trustees to apply the income to such purposes as he might appoint, and in default of appointment to charitable purposes. He appointed to charitable purposes. *Held* that absolute and not discretionary dedication was necessary to avoid taxation. *Rex* v. *Special Commissioners of Income Tax—ex parte Banks Trustees*, C.A. 26th April.

92. Marine Insurance Act, 1906, sec. 66 (5); institute cargo clauses, 1920, clause 4. Cargo owners had to pay 40 per cent. general average to the Italian Government for release of cargo. A foreign statement of adjustment could not be got. *Held* that without it the cargo owners could not recover from the underwriters. *Brandeis Goldschmidt & Co.* v. *Economic Insurance Company, Limited*, K.B.D. 28th April.

Appointments, Business Changes, &c.

Faculty of Advocates.—Mr. J. Condie Sandeman, K.C., has been unanimously elected Dean of Faculty in succession to Mr. A. H. B. Constable, K.C., who has resigned the Deanship on his appointment as Solicitor-General.

Dalbeattie.—Mr. James Little, solicitor, has assumed his son, Mr. James M. Little, as a partner. The business will be carried on under the firm-name of J. & J. M. Little.

Glasgow.—Mr. John Stewart Bannatyne, solicitor, is now practising in his own name at 142 West Nile Street.

Messrs. Young & Dand, writers and notaries, 121 St. Vincent Street, have assumed as a partner Mr. Horace Johnson Reed, solicitor. The business will be carried on at above address under the name of Young, Dand, & Reed.

Glasgow Faculty of Procurators.—The following law agents have been admitted members of Faculty:—Robert Wodrow Anderson, 196 St. Vincent Street; John Alexander Headrick, 237 West George Street; John Robert Renwick, 28 Bath Street; Thomas Randall Anderson, LL.B., 167 St. Vincent Street; Ninian Bannatyne Stewart, LL.B., 167 St. Vincent Street.

Incorporated Society of Law Agents in Scotland.—A meeting of the Council was held in Edinburgh on 25th May—Mr. Patrick Cooper, the president, in the chair.

Law of the Tenement.—It was reported that copies had been procured of the memorandum prepared by Mr. Whyte, with a series of forms annexed, and the Council instructed that these be issued to members and other law agents.

Fees in Sasine Office.—It was reported that the suggestions of the Council had been communicated to the committee engaged in the preparation of a memorial, and were now receiving consideration.

Printing in Appeals from the Sheriff Court.—Mr. Nightingale, S.S.C., reported as to the cost of copies made by a certain duplicating process, which disclosed that the cost of printing and binding copies of documents by this process would be much less than the present cost of printing. The Council resolved to approach the Society of Midlothian Procurators with a view to presenting a memorial to the Court regarding the adoption of this or some similar process.

Railway Act, 1921.—The Council had under consideration the terms of a letter written by the secretary of the S.S.C. Society to the secretaries of the Scottish railway companies with regard to the position of trustees who hold or may afterwards acquire stock in Scottish railway companies which it is proposed should be amalgamated with English companies, and suggesting that holdings in the present Scottish railway companies should remain Scottish estate for the purpose of confirmation. The Council approved of the various suggestions made by the S.S.C. Society, and agreed to take action in support of the same.

It is officially announced that an Order in Council has been issued extending the Maintenance Orders (Facilities for Enforcement) Act, 1920, to Tasmania and Western Australia. The Act provides for the enforcement in England and Ireland of maintenance orders made by Courts in any part of His Majesty's Dominions outside the United Kingdom to which it extends, and the legislatures of the above-mentioned States, to which it has now been extended, have made reciprocal provisions for the enforcement therein of maintenance orders made by Courts in England and Ireland.

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INCREASE OF RENT AND INTEREST UNDER THE RENT ACT OF 1920.

IF the decision of the First Division of the Court of Session in the case of *Kerr* v. *Bryde* is allowed to remain unaltered, then landlords of dwelling-houses to which the Act applies, and the creditors in heritable securities constituted over such subjects who have given the statutory notice of the increase of rent and the increase of interest, and have received the same, will find themselves now in an unenviable position. The material facts out of which the case arose are within short compass. The house in question was let to the defender on 28th August, 1916, at a rent of £1 2s. 6d. for a period of one month, including occupiers' rates, the rent being 18s. 3d. and the occupiers' rates 4s. 2d. per month, and at the expiry of that month was from time to time renewed by tacit relocation until, at all events, 28th August, 1920. On 27th July, 1920, the pursuer served on the defender a notice in terms of the Increase of Rent and Mortgage Interest Restrictions Act, 1920, intimating an intention to increase the rent, to become due and payable on 28th August, 1920, to the extent permitted by the Act. Various other notices which are immaterial to the present question were served upon the defender. The pursuer raised an action for the sum of £4 11s. 9d. in name of arrears of rent due to him by the defender. These arrears consisted of rent alleged to be due by virtue of the Act of 1920. The defender contended that he was not due these arrears in respect that he was not subject to the provisions of the Act as to rent, his contractual tenancy with his landlord not having been legally determined by a legal notice to quit, and that the tenancy in question was one subject to the ordinary rule of law governing tacit relocation. The determination of the question turned on the interpretation to be given to sec. 3 (1)

of the Act of 1920, and these words, "Nothing in this Act shall "be taken to authorise any increase of rent except in respect "of a period during which but for this Act the landlord would "be entitled to obtain possession." Following the decision of the Sheriff-Substitute of Dumbartonshire, where the case originated in the Small Debt Court there and was remitted to the ordinary roll, it has now been decided that all increases of rent under the Act of 1920 are invalid unless preceded by a notice to quit served on the tenant. The effect of the decision is that all increases of rent paid under the Act of 1920, that is, the first increase of 30 per cent. in July, 1920, and the second increase of 10 per cent. in July, 1921, except in cases to which sec. 18 (1) (*d*) of the Act applies, *i.e.*, dwelling-houses under £60 let on yearly lease ending at Whitsunday, 1921, regarding which special provision was made by the Act allowing landlords to make increases during the currency of these lets, are now recoverable by the tenant unless in those cases where notice to quit was validly given. Hence in all cases in which notice to quit was not given the increases paid under the Act of 1920 may now, under sec. 14, be recovered by the tenant or deducted by him from future rents. We feel confident this was not the intention of the Legislature when the Act under consideration was passed; but, as the language of the statute must receive its natural interpretation, it is submitted that the decision is in accordance with a strict interpretation of the terms of the statute, and that the law is thus correctly stated by Sheriff-Substitute Menzies, "that a valid notice determining the "tenancy is in this case a condition precedent to the opening "of the period during which a statutory increase of rent can "be legally made, and, that condition precedent not being "fulfilled, the increase made is not a valid increase under "the Act."

A further probable liability confronts proprietors. If the tenant is entitled to recover the increases paid under the Act he may be held entitled to recover the taxes paid to the landlord, especially in those cases where the taxes are paid along with the rent, *i.e.*, houses to which the House Letting and Rating (Scotland) Act, 1911, applies.

As regards the position of security holders who have given notice of and received an increase in the rate of interest, such increase can now be recovered by the debtor in the bond if prior to the opening of the period for which the increase was made the creditor had not served the requisite schedule of intimation, requisition, and protest.

The hope can only be now expressed that before this article is published the result of the representations made to the Secretary for Scotland and the meeting fixed with him for the 5th July will be that fresh legislation will be forthwith introduced enacting that the increases already sanctioned by Parliament shall receive effect without any additional formality than the service of the statutory notice of increase, and that the provisions of the amending Act will be retrospective. A.M'N.

LEAVE TO APPEAL IN CRIMINAL CASES.

The establishment of a Court of Criminal Appeal in Scotland has long been a matter of controversy, but two very important cases, decided within the last eighteen months in England, have again focussed attention on this subject. The first is the case of Field and Gray, who were indicted at the Lewes Assizes, before Mr. Justice Avory, for the murder of Irene Munro on the Crumbles at Eastbourne, in August, 1920. They were found guilty and sentenced to death, but appealed to the Court of Criminal Appeal. The case was heard in January, 1921, when the appeal was dismissed. It was, however, a legitimate source of satisfaction to the general public that any doubts still entertained in regard to these men's guilt were effectually removed both by the new, and contradictory, stories told by the prisoners, and even more by the extraordinarily searching and incisive cross-examination of the then Lord Chief Justice, Lord Reading. The second is the Armstrong case, decided in the Court of Criminal Appeal last May. As every one knows, two questions were raised there by the defence—(1) Was the Martin evidence admissible? (2) If so, were the jury rightly directed by the trial judge in regard to the inference to be drawn from that evidence? and the Court answered both in the affirmative. Uninstructed common sense, and a long array of authorities (the more modern of which begin with *Makin's* case, 1894, A.C. 57, and end with *Rex* v. *Lovegrove*, 1920, 3 K.B. 643), seemed alike to indicate that the evidence was certainly admissible, either positively, to prove intent, or negatively, to show that a defence of accident was untenable. Incidentally it was gratifying to note that the Attorney-General confessed failure to understand the term "system" as employed in this connection, and that he objected also to the vague Latinism "Nexus."

The alleged misdirection may have occasioned more difficulty. The passage objected to in the summing up of the

trial judge was the following:—"I came to the conclusion "that Martin's case has a bearing upon this. What is the "bearing? The bearing is this: that it is of value as show- "ing that the defendant had arsenic in his possession, and "that he would use it to poison a human being. Let me say "at once, if he is not proved to have given arsenic to Mr. "Martin with intent to injure him and kill him, if you come "to the conclusion that he did not do that, then "all the evidence in Martin's case has no bearing "whatever upon this case—none at all. But if you come "to the conclusion that he did give it, why, then, it has a "bearing as showing what he had got in the way of poison, "and what he was prepared to do with it: as showing that "he was prepared, not merely to use it on dandelions and "things of that kind, but that he was prepared to use it on a "human being, if he had what to him appeared sufficient "reason to do so." As Lord Hewart pointed out in his judgment, this was not a very fortunate way of putting it. For the words used are certainly capable of conveying the suggestion that "the appellant was a man who was in the "habit of committing, and might be expected to commit, "this particular crime." Had the Court considered that the passage necessarily meant this, then undoubtedly there was a misdirection. But, looking to the context, they decided that it did not; for the learned judge was dealing only with the question whether the poison had been procured for the innocent purpose of destroying weeds or for a felonious purpose. They were, further, of opinion that the evidence was sufficient to justify the verdict, apart altogether from the Martin incident, and that consequently sec. 4, sub-sec. (ii.) of the Court of Criminal Appeal Act, 1907, did not, on any view, apply. The sub-section in question provides that, "subject to the special provisions of this Act, the Court of "Criminal Appeal shall, if they allow an appeal against "conviction, quash the conviction and direct a judgment and "verdict of acquittal to be entered."

Apart, however, from the facts of this particular case, the point of general importance is that in England these questions in regard to admissibility of evidence and alleged misdirection by a judge can be dealt with as they arise; and where a prisoner has been unfairly treated in either respect, an appeal may be taken to a higher Court. But in Scotland there is no right of appeal except against the convictions of a summary Court, and no remedy is available to the accused in cases where there has been wrongful admission or exclusion

of evidence or an unfair summing up. A system which puts a man's life at the mercy of a judge and jury, with no opportunity, in any circumstances, of appeal, runs a grave risk of doing injustice in individual cases. And it may be added that the right of appeal, which we refuse, is granted not only in England, but also in France and in Germany.

The other argument for the establishment of a Court of Criminal Appeal in Scotland is that it would give an opportunity for developing our criminal law, and for obtaining authoritative judgments upon these difficult points of law which arise in practice from time to time. It is true that (as in the case of *H.M. Advocate* v. *Breen & Breen*, 1921, 1 S.L.T. 122) this can be done at present by a full bench, where the difficulty is foreseen. But there is no adequate machinery for dealing with intricate questions that emerge after the trial has begun. And it is submitted that, where a case raises in a sharp form the question of the effect of drunkenness, say, or insanity, in relation to criminal intent, the trial judge has not time fully to consider the legal issues involved, and counsel certainly has no time to make the investigation into the authorities which is necessary for the guidance of the Court. Accordingly, its judgments, given, so to speak, extempore, must tend to be arbitrary and lacking in uniformity. The result of this is that, in the absence of Scottish authorities, the decisions of the English Courts are being more and more relied upon as authorities in doubtful questions. To take the example already given, in a case where the fact of drunkenness becomes of importance in determining whether or not the accused was mentally able to form a criminal intent, the English case of *Beard* (L.R., 1920, A.C. 479) will be referred to for the law on this subject. The reference, of course, is to the judgment of the House of Lords, the English system having the advantage not merely of an appeal to the Court of Criminal Appeal, but a further appeal to the House of Lords, provided the Attorney-General's certificate that the case is one of sufficient public importance is obtained. This latter appeal is allowed only on a point of law. The mere enumeration of such cases as *Rex* v. *Ball*, 1911, A.C. 47; *Rex* v. *Christie*, L.R., 1914, A.C. 545; and *Rex* v. *Thompson*, 1918, A.C. 221, in addition to the cases already considered, is sufficient to show the great benefit which the English practice confers. Thus, not merely does the Court of Criminal Appeal sit to reconsider, where necessary, questions of fact as well as of law, but, in the last resort, important questions of law may be taken, just as in civil cases,

to the House of Lords. When all this trouble and care are expended in England to avoid even the semblance of injustice or mistake, it is difficult to think the existing practice in Scotland satisfactory from the point of view either of law or social ethics. C. DE B. MURRAY.

RENT ACT DECISIONS.

WHILE there have been not a few cases on the question of non-habitability of a dwelling-house in respect of the provisions authorising increase of rent, there has not, so far as we are aware, been any judgment in Scotland dealing with the effect of the corresponding provisions regarding bonds. Sec. 7 of the 1920 Act prohibits the calling up of mortgages provided the interest is punctually paid, the covenants of the mortgage observed, and the property kept in a proper state of repair. The question, what is a "proper state of repair," arose in *Woodified* v. *Bond*, 152 L.T.J., 10, in the following circumstances. In 1918 a property was conveyed to the plaintiff; the house thereon was old and in bad repair; the plaintiff only paid part of the purchase money, and mortgaged it back to the vendor to secure the balance by a deed dated two days later. In 1920 the mortgagee gave the plaintiff three months' notice calling in the mortgage, and the plaintiff not having paid it off, the mortgagee gave instructions for the property to be sold, whereupon in prevention of the sale the plaintiff claimed the protection of the Act, which admittedly was applicable; only the mortgagee contended that the benefit of the protection was not available to the plaintiff, as she had not kept the property in proper repair. The Court decided that even if in a private bargain an obligation to keep in repair involved an obligation to put in repair, whether it would do so or not in a public statute would depend upon the scope of the statute and the mischief which it sought to remedy; that the "proper state of repair" in which a mortgagor has to keep the property in order to obtain the protection of sec. 7 must be measured by the general condition of the property at the date of the mortgage and must not be extended beyond the preservation of the property in that condition.

As the finding of the Court of Session, that notice terminating the tenancy is necessary to allow of the statutory intimation of increase of rent to take effect is, we understand, under appeal to the House of Lords, discussion of it is postponed, but we may refer to the judgment of the King's Bench in *Schmidt* v. *Christie*, 66 S.J. 539. There the defendant

rented part of a house from the tenant of the whole house, and when at 31st December, 1920, the tenant relinquished his tenancy, the defendant made a direct agreement with the landlord under which he was accepted as principal tenant of the part of the house at 35s. per week, which he paid up to 13th August, 1921, when he disputed the landlord's right to have this increase and refused to pay it. The landlord sued for payment, and the defendant counterclaimed to be repaid the difference for thirty-two weeks between the 35s. he had paid and the standard rent of 21s. The County Court judge decided in favour of the landlord, but on appeal the Divisional Court held that the provisions of the Act allowing increase of rent after notice given had not been complied with, and therefore only 21s. a week was recoverable; that as against a new tenant a landlord could not by mere agreement at reletting increase the rent; no such increase could become operative till after the determination of an existing tenancy, and only then if a valid notice had been given under sec. 3 (2) of the Act.

The decision would appear more far-reaching than the Scottish case, for in the latter there was no fresh contract of letting. Standing these two judgments, the law would appear to be that in order to successfully recover the statutory rent it is essential that the old tenancy be terminated, and that notice of increase be given; agreements for increase of rent independent of such procedure are apparently useless.

The case of *Simmonds* v. *Crossley*, 38 T.L.R. 571, settles a point as to period of notice, which is of value not only as regards rent agreements, but agreements generally, and service contracts in particular. In the case referred to the house in question was admittedly held on monthly tenancy, and the landlord gave notice on 15th March, 1921, that he required to resume possession for personal occupation. He was found entitled to such possession by the County Court judge, but an appeal was taken, the point of which ultimately came to be whether the notice to quit was good or bad. The tenancy being a monthly one, and having commenced on the 1st of the month, it was contended that a notice to terminate a monthly tenancy beginning on the first of a month must be so given as to expire on the last day of one month or the first day of the next month, and at no other time. The Divisional Court held that to determine a monthly tenancy reasonable notice must be given, and that such notice, if in other respects reasonable, was not rendered unreasonable and invalid merely because it expired on some day other than the last day of a month calculated from the commencement of the tenancy.

It is in fact surprising that the position of sub-tenants under the statute has not given more trouble than it has. *Reynolds* v. *Bannerman*, 1922, 1 K.B.D. 719, contains an important ruling on one aspect of the subject. A tenant who has sublet part of his premises may wish to give up his tenancy, but unless he can get the sub-tenant out, he obviously is not in a position to restore the subjects vacant to the proprietor. In the case mentioned the tenant quitted the portion of the premises in his personal occupancy on 25th March, 1920. He had notified the sub-tenant to remove, but the latter claimed to be a statutory tenant under the protection of the Rent Restriction Acts, and did not go out till August, 1921. During that time the sub-tenant paid no rent, the landlord looking to the tenant to pay it, and the tenant contending that as he had given up his tenancy, he had no more right to demand any further rent from the sub-tenant. The landlord brought an action against the principal tenant for rent from 25th March, 1920, or alternatively for use of the premises, alleging that the tenant had had occupancy, if not personally, then by his sub-tenant. He succeeded in the County Court, but on appeal the Divisional Court found that the tenant had done everything he could to give the plaintiff possession, and his interest in the premises having ceased on 25th March, 1920, he was not liable for rent or in respect of use after that date. Having regard to the protection afforded to sub-tenants by the statute, the tenant could not have got rid of the sub-tenant by any legal process. The sub-tenant remained in possession as a statutory tenant, and for that the principal tenant was not to blame.

THE PLEADER.

THE House of Lords judgment in *Crerar* v. *Bank of Scotland*, 1922, 1 S.L.T. 336, discloses a point which though elementary is yet apt to be lost sight of, namely, that findings of fact in the Sheriff Court are reviewable by the Court of Session, but not by the House of Lords. "The judgment shall "be subject to appeal to the House of Lords in so far "only as the same depends on or is affected by "matter of law, but shall in so far as relates to the facts be "held to have the force and effect of a special verdict of a jury "finally and conclusively fixing the several facts specified in "the interlocutor" (6 Geo. IV., cap. 20, sec. 40). The practical importance of this is that if there is the possibility of a case going to the House of Lords—even on a question of law, for every practitioner knows that in the majority of cases

arguments on points of law may lose a great part of their force if reference to the facts is precluded—it should be initiated in the Court of Session.

The pursuer's averments in *Rayner* v. *Kent*, 1922, 1 S.L.T. 333, were found irrelevant, but the case furnishes a reasoned judgment by Lord Blackburn why in his opinion the Gaming Act of 1835, which, *inter alia*, entitles the loser of a bet paid by cheque to recover the money from the winner as a debt due, applies to Scotland; and that therefore the case of *Sutters* v. *Briggs*, 1922, A.C. 1, is applicable. The decision also indicates what specification is necessary to relevancy in actions to recover the amount of cheques drawn for bets.

We cannot regard the House of Lords decision in *Percy* v. *Glasgow Corporation*, 1922, 1 S.L.T. 356, but as a novelty. It was an action of damages for wrongous arrest, and the First Division held it irrevelant as against the corporation for the reason that their bye-laws only gave their tramway servants power to arrest if a passenger refused to give his name and address. Here the pursuer gave his address, and consequently his arrest being contrary to the bye-law it was not within the scope of his authority so as to infer liability for the arrest against the corporation. So the corporation argued and the First Division held. As the Lord President said, "For "the pursuer to attempt to make the employers liable in these "circumstances is impossible. He avers action which was not "under the scope of the employees' authority, and which he "says he knew was not under the scope of their authority." That certainly expresses the generally accepted understanding of the law hitherto. The effect of the decision referred to may be best gathered from the concluding sentence of Lord Dunedin's opinion—"If the officials are genuinely purporting "to act under the bye-law, then if they make a mistake either "of fact or of law, which leads them to arrest wrongously, that "is to say, in a way the bye-law does not allow, I think the "corporation are liable." We do not regret the change in the law. As Viscount Finlay observed, it will make for the security of the travelling public. In these days of extensive Bumbledom it is all to the good that the law should be vigilant in safeguarding individual right and liberty.

The facts averred in *Smart* v. *Stewart*, 1922, 1 S.L.T. 59, are, we understand, an instance of a not uncommon course of procedure in a certain line of business, but recently, at all events, there has been no case reported; and it will be instructive to have on record a definite illustration of the *modus operandi*. The action was at the instance of

William Smart, carpenter, Aberdeen, against Alexander Stewart, contractor, Perth, for payment of £90, being the amount contained in a cheque granted by defender to a third party. On 19th July, 1921, the defender drew this cheque on the North of Scotland and Town and County Bank, Perth, in favour of William Mullen, Aberdeen, in settlement of the price of horses which he had purchased. On the same day, after bank hours, the said William Mullen requested the pursuer to cash the defender's said cheque, which the pursuer agreed to do. On the following day the pursuer, in exchange for the endorsed cheque, handed the sum of £90 to Mrs. Mullen, wife of the said William Mullen, as had been arranged between the pursuer and Mullen, whereby the pursuer became the holder for value of the cheque. The pursuer thereafter paid the cheque into his bank for collection, and on 25th July, 1921, the pursuer received intimation that payment had been stopped by the defender. In his defences the defender admitted that he had purchased from Mullen the horses referred to and had paid him by said cheque, but he explained that the horses were warranted good workers, but that two of them had failed to come up to this warranty, that he had intimated this failure to Mullen and stopped the cheque accordingly. He then went on to aver that the pursuer was not the holder for value of said cheque, but was acting in collusion with Mullen so as to avoid the implement of the warranty referred to. The pursuer in answer to this pleaded that it was no relevant defence, and that he (the pursuer) being a holder for value of the said cheque was entitled to decree. This plea was sustained and decree in favour of pursuer granted, the Court holding that defender was not entitled to a proof of his averments unless he could specifically aver (*a*) that value had not been in fact given by the endorsee; and (*b*) that the endorsee was cognisant of the fraudulent scheme averred.

Literature.

COMPANY MANAGEMENT. By H. C. Emery. Third Edition Revised. London: Effingham Wilson. (12s. net.)

This book fulfils two very commendable functions. It will be found a reliable guide by directors, secretaries, and others in the discharge of their multifarious duties connected with the management of public and private companies, while to lawyers who are called upon to advise the responsible officials of such corporations the many references to decided cases which are given throughout the text materially add to the

value of the work as a book of reference. The outstanding characteristic of the manual is the methodical treatment of the subject. From the formation of a company up to its final liquidation the main essentials are considered and explained in a manner easily to be comprehended. The requisites of the memorandum and articles of association and the prospectus are concisely stated. The chapter dealing with penalties will prove useful to officials of companies. Here they are told what pitfalls they must guard against if they wish to avoid the many penalties imposed by the Act. The Limited Partnerships Act of 1907 has a chapter to itself. What useful purpose to the honest trader this Act was meant to serve we have never been able to understand.

County Court Practice Made Easy or Debt Collection Simplified. By a Solicitor. London: Effingham Wilson. (4s.)

The utility of this book is proved from the fact that it is now in its fifth edition. On its merits it is an excellent guide to an intricate subject. We have no such book on Scottish procedure. The author makes no attempt to discuss questions of law. He states, and that with conspicuous clearness, the various steps of procedure a creditor must follow to enforce payment of a debt from a recalcitrant debtor. The book only deals with debts not exceeding £100, as that is the limit of the County Court jurisdiction. If the steps of procedure here detailed are carefully followed, a creditor need have no difficulty in prosecuting his own claim in the County Court, while the junior clerk in a lawyer's office, to whom such cases are usually delegated, will find his work easy. The book is abundantly supplied with forms, and a like work on Scottish procedure for the recovery of debts and the enforcement of decrees might meet with considerable acceptance.

Jones' Solicitor Clerk. Part I. Ninth Edition. By T. S. Duffill. London: Effingham Wilson. (8s 6d. net.)

Students of law in England have no reason to complain of the lack of books to guide them in their studies. This work is intended for the ordinary law clerk in his ordinary work. It sets out concisely and clearly not only what is expected of a clerk, but what is of more use to him, how to do it. The reader is told how to endeavour to obtain a situation, and thereafter, having obtained the situation, he is taken step by step through the varying work which he will find in a law office. The book will be found of peculiar benefit on account of the many forms given, not only of deeds, but of the attestations thereof. The list of abbreviations used in legal offices, and the analysis of stamp duties, are instructive. The practice in the High Court of Justice and the schedule of fees payable should enable a junior clerk with ordinary intelligence to attend to the procedure in pending cases without

difficulty. The clerk who is attending to the winding up of the estates of deceased persons will here learn all he should know as to the procedure necessary to obtain probate and letters of administration. In short, the work should be at the side of every law clerk in England who is interested in his work and determined to do that work accurately and without the necessity of continually asking guidance from his employer.

A SELECTION OF CASES ILLUSTRATIVE OF ENGLISH CRIMINAL LAW. By G. S. Kenny, LL.D., F.B.A., late Professor of Law in the University of Cambridge. Cambridge: University Press. (17s. 6d. net.)

This volume of select cases, so long known to students of English law as a companion volume to the author's "Outlines of Criminal Law," has now reached its fifth edition, and includes at least one case as recent as 1920. But the "select "cases" are not merely an appendix to the "Outlines." The author's careful arrangement of the cases selected enable him to give with the head-notes to each case, an account of legal principles sufficiently connected to make it profitable to read the book straight through. Students of English criminal law are indeed fortunate in having the labours of Dr. Kenny to guide them through a morass of precedents.

BALFOUR'S HANDBOOK OF COURT OF SESSION PRACTICE. Fifth Edition. By Robert Berry. Edinburgh: W. Green & Son, Ltd. (15s. net.)

It is thirty years since the first edition of this work was issued, and, as the editor now informs us, "scarcely a sentence "of the first edition remains unaltered." The present edition has been brought thoroughly up to date, and due effect has been given to such recent statutes as The Married Women's Property Act, 1920, the Trusts Act, 1921, and the Acts *re* women jurors. To the student preparing for examination in legal procedure no better guide can be recommended than the one now under review. The book will continue to have a wider circle of readers, and is now indispensable on the table for ready reference of every practitioner in the Court of Session. Mr. Berry has done his work admirably, and the present edition maintains the justified high standard of former additions. We miss, however, in the present volume the forms of accounts which were so useful in at least the last edition. It is one thing to carry through a case, but it is as important to the lawyer to know properly how to charge.

THE GENERAL EYRE. By W. C. Bolland, M.A., of Lincoln's Inn, Barrister-at-Law. Cambridge: University Press. (6s. net.)

This very interesting and instructive little book contains three lectures recently delivered by the author in the University of London at the request of the Faculty of Law. The

first lecture deals with the early English Courts and the relation to them of the commissions granted to the Justices in Eyre. The second lecture describes the opening of an Eyre and its jurisdiction over the county officials and local trade. The third lecture treats of the Eyre's judicial functions—the Crown pleas, the writ of *quo warranto,* and bills in Eyre. The author's conclusion seems to be that, while the functions of the Eyre were ostensibly administrative and judicial, in reality its main purpose was the collection of revenue for the King's treasury. As the records of the proceedings of the Eyre are to be found for the most part in the manuscript Year Books which Mr. Bolland has made the object of special study, this little book must be regarded as speaking with authority. The author's delightful style and the intricacy of his description of provincial life in mediæval England make his narrative of the doings of the commission of Eyre most realistic. We can thoroughly recommend this volume to all who have interest in legal history or in the social life of England in the Middle Ages.

Obituary.

On 2nd June, Mr. John D. Wyllie, solicitor, Kilmarnock, aged sixty-one. Mr. Wyllie had a large Court practice, which he built up by a most assiduous care in the interests of his clients, and a tenacity which made him loath to acknowledge defeat. He leaves a widow and two young children.

On 3rd June, the result of a motor accident, Mr. Norman James Macdonald, S.S.C., M.C., aged twenty-seven. Mr. Macdonald, who was the sole partner of the firm of Messrs. Clark & Macdonald, S.S.C., Edinburgh, was educated at Dollar Academy, and was the only surviving son of the late Mr. A W. Macdonald, S.S.C. He is survived by his mother and three sisters.

At Inverness, on 5th June, Mr. Frank W. Grant, aged sixty-eight. Mr. Grant was a partner of the firm of Messrs. W. R. & F. Grant, county collectors of Inverness-shire.

At Selkirk, on 6th June, Mr. John Steedman, S.S.C., aged eighty-seven. Mr. Steedman was the oldest member of the Society of Solicitors before the Supreme Courts, having joined in 1864. He was a native of Perthshire, and about fifty-eight years ago he went to Selkirk, where he was associated in business with Mr. John Lang. He was the first county clerk of Selkirk, and retired from that office in 1914.

At Edinburgh, on 6th June, Mr. John Walter Stevenson, W.S., aged forty-two, sole partner of Messrs. Lockhart-Thomson & Stevenson. Mr. Stevenson was educated at the Edinburgh Institution and Edinburgh University, and served his legal apprenticeship with Messrs. Menzies, Bruce, Low & Thomson.

At Edinburgh, on 11th June, Mr. Harry Adamson Young, advocate. Mr. Young was educated at Glasgow University, and was admitted a member of the Faculty of Advocates in 1912. At the outbreak of war he went on active service.

At Edinburgh, on 12th June, Mr. Charles Cook, W.S., aged seventy-two. Mr. Cook, who was a partner in the firm of Messrs. W. & J. Cook, W.S., was admitted a member of the Society of Writers to the Signet in 1876, and for over twenty years had acted as collector of the Widows' Fund.

At Edinburgh, on 23rd June, Mr. George Dunlop, W.S., aged seventy-four. Mr. Dunlop was senior partner of the firm of Messrs. Russell & Dunlop, W.S., but retired from active business in the beginning of 1921. He was a director of the Bank of Scotland, the Scottish Provident Institution, and other well-known companies.

Notes from Edinburgh.

PARLIAMENT HOUSE, 30*th June*, 1922.

ALMOST exactly two years have gone by since the rumour concerning the resignation of Lord Salvesen was first put into circulation, and, while ample time has thus been afforded to all interested to get used to the idea of his lordship's vacating office, the remarkable thing about the substantiating of the truth of the rumour, the departure of Lord Salvesen in the middle of June, has been the surprise caused to the many self-informed prophets who, on the unlooked-for return to duty of his lordship after the spring vacation, had it settled that October next was to be the real time to expect the creation of a vacancy on the bench. The death of Lord Dundas in February last left Lord Salvesen in the position of being the senior judge on the bench, and yet, as regards age, the retired judge has four senators who are his seniors, which is explained by the fact that he was appointed a judge in 1905 when only forty-eight years of age. There are now three ex-senators on the retired list, viz., Lord Trayner, Lord Johnston, and Lord Salvesen, and it is probably a unique circumstance to find, as in the case of Lord Trayner and Lord Salvesen, a venerable ex-judge and his son-in-law forming two-thirds of a retired trio.

Within five months the Second Division bench has had its composition materially changed by the death of Lord Dundas and the resignation of Lord Salvesen, and it is likely that the loss of Lord Salvesen's services will diminish the popularity of that tribunal as a forum for the hearing of maritime causes, because during his career as counsel and judge, as befitted the

son of a Leith shipowner and merchant, Lord Salvesen's special forte was shipping law, and his practical experience of ships and of those who go down to the sea in them was undoubtedly a valuable asset to himself, to the bench, and to the litigating public. In mercantile law and company law also he was well equipped by experience; and in the domain of criminal administration his faculty of psychologically analysing facts and circumstances was a distinguishing feature of his exercise of judicial functions. Versatile of talents as a pleader, he engaged in the most varied and diverse classes of work. As a jury counsel his services were much sought after, and his experience as counsel fitted him well to be, later, a judge adapted for the trial of civil jury causes. For which reason he was as an Outer House judge not well patronised by pursuers, who don't want a judge too well used to the ropes; and yet, strangely enough, on his promotion to the Inner House, he earned the reputation of being a "pursuer's judge." In a posthumous sense Lord Salvesen is a worthy son of Edinburgh, for he was born and brought up in Leith, and the seaport town has now been annexed by the capital. As a public-spirited citizen of the capital, his lordship's activities, apart from his judicial functions, have been manifold, and his particular interest in the Royal Scots regiment during and after the great war, and his devotion to the cause of broken and maimed veterans of all branches of the services have earned for him the gratitude of thousands who have reason to bless his practical exercise of an understanding sympathetic humanity, for Lord Salvesen himself as a parent was sore stricken by the great conflict.

The present Lord Advocate's immediate predecessor in office was content to go on the bench by means of the lowest rung of the ladder, and for a time it was regarded as a certain thing that Mr. C. D. Murray would, on the vacancy being created by Lord Salvesen's resignation, be disposed to follow the same course as did Mr. Morison; but (though the simple-minded layman cannot understand why) as political considerations operate in such matters, the chance has come to the Solicitor-General to become a judge instead of to his superior, for Mr. Constable leaves no seat in Parliament to cause a bye-election, which at the present time would be undesirable. Mr. Constable's elevation to the bench is an event which meets with the hearty approval and satisfaction of everybody, for his great reputation as a lawyer and pleader, and his personal attributes as a man have made him one of the most popular personages in Parliament House, and there can be no doubt that he will prove a most excellent judge. There have in the past been examples

of brilliant lawyers being but indifferently successful in the judicial rôle, but the new judge has the judicial mind and temperament, and the bench gains strength by his elevation to it. He was admitted to the Faculty in 1889, took silk in 1908 with a great reputation as a junior behind him, and his success as a senior placed him in the front rank of pleaders. Honours came in quick succession to him towards the close of his career at the bar, for within the space of little more than three years he was in succession Sheriff, Dean of Faculty, and Solicitor-General. During the war he followed in the footsteps of the present Lord Advocate by giving up a lucrative practice to engage in work for the War Department, and he succeeded Mr. Murray in the position of Inspector of Recruiting for Scotland, with the rank of captain, his duties being the supervising of the various tribunals. He had already been prominently identified with the local Volunteer movement, and was one of the originators of the Military Training Associations in Edinburgh, which later became merged in the Volunteer force. At the close of hostilities he received the C.B.E. order in recognition of his services.

Ill-informed people may be expected to raise the familiar question about the wisdom of filling a vacancy on the Scottish bench at a time when preparations are being made to close down for the long vacation. There are now but three weeks to run before the vacation arrives, and to the uninstructed mind it might appear to be a simple matter for the Court of Session to carry on with one judge short of the thirteen. As it happens just now, there is clamant need of a full complement, for, even with a fully manned bench there is trouble looming ahead in regard to having all the work set down disposed of. Lord Anderson goes to Jedburgh on a circuit which was to have been taken by Lord Salvesen; the Lord Justice-Clerk is engaged at the heavy criminal trial in which income tax frauds are charged against two individuals; Lord Sands has a formidable proof in an action over shipping insurance claims which is running to greater length than had been anticipated, and his other engagements have to be attended to by such judge or judges as can spare the time for the purpose, no easy matter to arrange for at present. The closing weeks of a session are always busy, and so long as programmes are made up in advance on a thirteen judges basis, any alteration of such programmes would mean hardship and expense thrown on litigants.

Lord Constable (for it is understood that such will be his title) has appointed as his personal clerk Mr. James Sutherland, who was clerk to the late Lord Dundas, and before that to the

late Lord Moncreiff, formerly Lord Welwood. Mr. Sutherland must surely hold the record for length of service as a Parliament House functionary. His career goes away back to the days when Lord Strathclyde as Mr. Ure was coming to the front as a junior, and Mr. Sutherland, then a counsel's clerk, attended him before going on the bench as clerk to Lord Welwood.

The vacation jury trials for civil causes are due to commence on 21st July next, and the lists of trials are disappointingly light, only seven cases being forward, two being in the First Division and five in the Second Division. Two, or at most three, days should be enough to see the lot worked off.

The new cases brought into the Outer House during June amount to 126, and of these there are 41 divorces. Lord Ashmore heads the list with 51, there being 12 divorces; Lord Sands follows with 27, and 10 of these are divorces; Lord Morison has 26, there being 8 of them divorces; Lord Anderson has 18, and 11 are divorces; and Lord Blackburn has a modest 4, none of them being divorces. The drop in Lord Anderson's figures is explained by the fact that he takes his place in the Second Division once the new judge is installed, and doubtless Lord Ashmore has received some of the causes which otherwise would have gone to Lord Anderson, for Lord Ashmore's figures are out of the usual proportion. The new judge will inherit the work which was before Lord Anderson.

The Inner House supply of new work for the month consists of 39 cases received, and 29 of them have gone to the First Division and 10 to the Second Division. The First Division share is made up of 18 reclaiming notes, 4 appeals, 4 stated cases under the Workmen's Compensation Act, and 3 special cases; while the 10 in the Second Division consist of 6 reclaiming notes, 3 remitted causes for jury trial, and 1 special case.

Notes from London.

THE TEMPLE, 30*th June*, 1922.

> The times have been
> That, when the brains were out, the man would die
> And there an end: but now they rise again.

THUS the soliloquy of Macbeth when the ghost of Banquo rises to disturb the banquet. A possible application of this famous quotation will strike the mind of the lawyer as he ponders the legal history of the month. It has been much concerned with the affairs of criminals who have paid, or in one case, as some think, ought to have paid the last penalty of their crimes.

Mr. Shortt, the Home Secretary, has been bitterly attacked because he reprieved Ronald True and did not reprieve the boy Jacoby, yet a careful examination of the two cases will show that he could not have done other than suspend execution in the case of the one, and that there were powerful reasons for permitting the law to take its course in the case of the other. Ronald True had, no doubt, been found guilty of a disgusting crime, perpetrated against an unfortunate woman; the whole circumstances showed great callousness, and robbery of a few trinkets seemed the only conceivable motive. At the trial two prison doctors, who were obviously quite unbiassed, and who had exceptional opportunities of examination, gave evidence that he was insane; the jury, as they were entitled to do, disregarded their evidence, and they did not accompany their verdict of guilty with any recommendation to mercy. The Court of Criminal Appeal dismissed the application of the convict to set aside the verdict and judgment, but the Lord Chief Justice in doing so expressly referred to the powers of the Home Secretary to hold a further inquiry, and in effect he remitted the whole matter to him to be dealt with. Under the Criminal Lunatics Act, 1884, sec. 2 (4), when such a course seems desirable, the Home Secretary must appoint two or more medical practitioners to inquire into the sanity of the convict. Mr. Shortt did this, and it is hard to say how he could have done otherwise. Two official medical men were named, and with them was joined Sir Maurice Craig, an eminent specialist in such matters. All three made careful inquiry, and unanimously reported that the convict was insane. On such report the Home Secretary may take such action as he deems proper, but Mr. Shortt could scarcely have disregarded the reasoned opinion of this committee of experts, and the reprieve of True was the inevitable result. The origin of the convict remains a mystery; it was darkly hinted that he was of high social position, and that undue influence was used in his favour. It is clear that there was not a word of truth in this; it is only mentioned to show the nature of the attacks made against Ministers of State in the exercise of delicate duties. The reprieve of True in fact resulted from a natural evolution of events; the remarks of the judge at the trial and of Lord Hewart in the Court of Criminal Appeal imposed on Mr. Shortt the duty of inquiry, and this duty he simply performed, with the result stated. Sir M. D. Chalmers, in a letter to the *Times*, puts the question from his point of view in a nutshell. Would the accused have committed the murder if a policeman had been standing by? If he would, shut him up; if he would not,

hang him up. This is cutting the knot with a vengeance. Difficult legal problems are not to be resolved in this summary fashion. A man may not be a raving lunatic, and yet may be sufficiently a lunatic to render capital punishment improper in his case; it is a question, and often a very delicate question, of degree of madness. Now, it is possible that the law as to the relation of insanity to crime may not be at this stage of the nation's progress in a satisfactory condition, but with that the Home Secretary had obviously nothing to do. He took the law and applied it as he found it, with the result above set forth.

By a rather unfortunate coincidence the case of Jacoby came up for consideration at the same time. Here the criminal, as will be remembered, murdered Lady White, who was a guest in the hotel where he was employed; he entered her bedroom intending to rob her, and slew her to prevent detection. This crime was as atrocious as the other. He was practically a servant of his victim. In old English law the murder of a master by his servant was considered a species of treason, and was well-nigh the gravest offence which it was possible to commit. The confidential relation of the parties was no doubt the reason for this, and though the law is changed, the gravity of the deed is still unquestioned. Jacoby was not insane, and the only reasons that could be urged in mitigation were that the crime was not premeditated, and that the accused was a lad of only eighteen; yet the history of the case showed that the murderer was determined to go all lengths to carry out his purpose. Also, the law considers a man of eighteen to be as responsible in such matters as a man of eighty. The reasons given, however, were sufficiently powerful when skilfully pressed on the jury to induce a recommendation to mercy with which the inevitable verdict of guilty was accompanied. A serious responsibility was thrown on the Home Secretary; he did not see his way to give effect to that recommendation, and, having the courage of his opinions, he, in spite of a considerable amount of popular clamour, allowed the law to take its course. The passion of the moment has already died away, and the great body of legal opinion is now in his favour in this as in the other matter.

The Armstrong case, as we all know, is done with as far as Armstrong is concerned; but matters concerned with it have not quite vanished from the law Courts. Proceedings have been taken by creditors against his estate, and the fact has become clear that though he was able to procure funds for his defence, he was in reality insol-

vent. At the trial the want of apparent motive was strongly urged by counsel for the defence. These later proceedings show that a motive did exist which, however base, has been found efficacious in all stages of the world's history. The majority of murders have been committed to procure some pecuniary advantage to the murderer, and this would after all seem to be another case in point.

The extradition of Gerard Lee Bevan drags its slow length along. It has few points of legal interest, save that it has shown once again the utter uselessness of the passport system. Before the war we were tolerably quit of this absurdity, but the great conflict imposed upon the world a number of legislative fetters, old and new, from which we are a terrible time in getting free. These restrictions called into being hosts of officials whose interest it was to keep such things in force for the fees which it was possible to exact for themselves and for the Governments that employed them. No one has ever shown what advantages can accrue to the community from the restrictions placed on free intercourse between countries by the continued use of passports. Bevan may be quite innocent, and his flight may be due to mere nervousness or some other guiltless motive. However, he did bolt as early as February last, and he seems to have moved about the Continent quite freely until he was caught recently in Vienna. It was easy enough to get somebody else's passport, and that passport was good enough for him. It was not on account of any deficiency in it that he was captured. Unfortunately, the system is so strongly established that it may be many years before we recover our former liberty in this and many other matters which it would be tedious to recapitulate; in fact, we even hug our fetters. The grand jury system was abolished during the war, and no single instance of any evil result from this abolition has ever been brought forward, but it has come into being again, with all its useless complexity, cost, and delay. It was thought that in the case of quarter sessions at least it would have been ended, but legislators are apparently too busy to attend to such matters, and though the great body of legal opinion was in favour of total abolition, even moderate reform seems as far off as ever.

The discovery in Italy of two portraits of Lord Westbury has brought back to our time the memory of a great career and an interesting personality. His work as a law reformer, his judgments in the House of Lords as Chancellor, and in the Privy Council are not very prominent to-day, for it is the nature of such things to pass all too swiftly from the memory

of men. The stories about him, true or invented, have been told over again in the legal journals, for, as Lord Bacon said, "The river of time carries down such light matters when "things of more substance have sunk to the bottom out of "sight." One of the portraits has been appropriately placed in the National Portrait Gallery, and the other not less appropriately in the Board Room at Whitehall, where the Privy Council judgments are delivered. It was there he gave the famous decision in the *Essays and Reviews* case, wittily parodied in a mock epitaph of which the more pungent portion was said to be the work of the late Lord Bowen. It ran thus—"He "dismissed Hell with costs and took away from orthodox "members of the Church of England their last hope of eternal "damnation!" Westbury was fond of an outdoor life, and was in his own opinion an expert shot. Once he reproved his son Slingsby Bethell, "How often have I remonstrated with "you for handling firearms carelessly: apparently you "have shot one of my keepers whom I hear vociferat-"ing in the bushes." Chief Justice Cockburn was one of the party; he was by no means sure that the younger Bethell was to blame, and took an opportunity to ask the injured keeper who really had shot him. "Dang 'em, they both did," was the emphatic answer. Some time after Cockburn and Westbury were discussing the exact date of some event or other. "Dear Cockburn," said Westbury, "it was when you shot my keeper!" Mr. Nash, Lord Westbury's biographer, has denied this story, which no doubt owes as much to Cockburn himself as to Westbury, but our classic legal stories are probably half the work of those who tell them. When one reads the Scots Lord Cockburn's "Memorials of his Time" one wonders if Braxfield was as quaintly brutal or Eskgrove as comically stupid as is there set forth. Impossible to tell how much is due to the entertaining anecdotist. Another story about Westbury is at any rate quite probable. His coachman was driving him along a crowded London street when the horses shied and bolted. The Lord Chancellor did not lose his presence of mind. Before his swift vision a whole set of legal actions for damages at once arose. "Drive into something cheap," he shouted to his bewildered servant! The building in which those notes are usually put together is the ornate Gothic structure which has served as library to the Middle Temple for over half a century. It used to be known to Templars as Little Bethell. Westbury had a son who had adopted the profession of an architect, and

to him the designing of the building had been entrusted. It was too good an occasion for the "discoursing wits" that abound in these parts to let pass. Hence the nickname which seems of late to have fallen into decay.

NOTES OF ENGLISH CASES.

THE following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

93. Sale of Goods Act, 1893, sec. 14. Fitness for particular purpose. Where goods are ordered for a special purpose and order accepted, the buyer relies on the seller's skill or judgment. *Manchester Liners, Ltd.* v. *Rea, Ltd.*, H.L. 3rd April. 38 T.R. 526.

94. Criminal law. A limited company cannot be committed for trial for an indictable offence. *Rex* v. *Daily Newspapers, Ltd.*, C.C.A. 3rd April. 38 T.R. 531.

95. Companies (Consolidation) Act, 1908, secs. 186, 207, and 209. A debt due from a limited company to the Crown in respect of goods sold by the company on behalf of the Crown is not payable in priority when the company is in voluntary liquidation. *Re Webb & Company, Smithfield (London), Ltd., in Liquidation*, C.A. 10th April. 38 T.R. 579.

96. Excess Profits Duty. Finance No. 2 Act, 1915, sec. 40, Sch. 4, Part 1, rule 8, Part 3, rule 2. Investments in Rule 8 include all investments other than those expressly excepted, and in estimating the capital for the purpose of calculating the percentage standard, the amount of such investments is to be deducted. *Inland Revenue Commissioners* v. *Gas Lighting Improvement Company, Ltd.*, 4th May. 38 T.R. 613.

97. Telegraph Act, 1863, sec. 6; 1878, secs. 3, 4, and 5; 1916, sec. 1. The Railway and Canal Commission Court has exclusive jurisdiction in disputes with private owners as to posts and wires on private land. *Postmaster-General* v. *Brookes*, R. & C.C. 1st May. 38 T.R. 623.

98. Companies (Consolidation) Act, 1908, sec. 93. Pledge of documents with bank. Trust by bank to pledger for realisation of goods. *Held* that such a trust was not a mortgage or charge of the book debts of the company and was valid in a question with the liquidator. *North Western Bank* v. *Poynter, Sons & Macdonald*, 1895, 22 R. (H.L.) 1, A.C. 56 referred to. *Re David Allester, Limited, in Liquidation* v. *Barclay's Bank*, Ch.D. 3rd May.

99. Land Transfer Act, 1897. Legal personal representative's power to sell surface and minerals separately. He is a trustee and cannot do so without leave of the Court. *Re Chaplin's Contract*, Ch.D. 5th May. 38 T.R. 618.

100. Policy of insurance against loss by revolution, &c., contained a clause excepting "confiscation or destruction by the government of the country in which the property is situated." The Bolshevists took

possession of the property. They were recognised by the British Government as the *de facto* government of Russia at the time. *Held* that there was no claim under the policy. *White Child & Beney, Ltd.* v. *Eagle, &c., Insurance Company, Ltd.*, C.A. 5th May. 38 T.R. 616.

101. Indemnity Act, 1920, secs. 2 (1), 6. Appeal from war compensation Court. *Held* that claimants were entitled to expenses incurred in substituting premises for those taken by the Secretary of State for Air. Remit to tribunal to reassess. *A. & B. Taxis, Limited* v. *Secretary of State for Air*, C.A. 11th May. 38 T.R. 671.

102. Administration of Justice Act, 1920—Colonial Probates Act, 1892. *Held* that a Canadian probate granted to a limited liability company as executors could be resealed, although illegal by English law. *Re Robert M'Laughlin*, Ch.D. 11th May. 38 T.R. 622.

103. Railway—special contract—owner's risk. Where there is a divergence from the usual route the contract does not protect the railway company. *Foster* v. *Great Western Railway Company* (1904), 2 Q.B. 306, over-ruled. *London and North-Western Railway Company* v. *Neilson*, H.L. 12th May. 38 T.R. 653.

104. Bankruptcy—secret formulæ for making articles traded in. The bankrupt is bound to reveal these to his trustee. *Re Keene*, C.A. 12th May. 38 T.R. 663.

105. Railway passenger's luggage. A suit case was stolen from the vestibule of the Pullman car *en route* from Dover to London. The Pullman ticket excluded liability. *Held* that the railway company was liable but not the Pullman. *Ehinger* v. *South-Eastern and Chatham Railway Company* and *Pullman Car Company, Ltd.*, K.B.D. 11th May. 38 T.R. 678.

106. Criminal law. Admissibility of evidence of similar actions by accused. *Held* that evidence of an action by the accused eight months after the crime charged was admissible in the circumstances. *Armstrong* v. *The King*, C.C.A. 16th May. 38 T.R. 631.

107. Increase of Rent, &c., Act, 1920, sec. 3. Where a new tenancy has been granted since the Act, secs. 3 (1) (2) must be complied with before the increased rent can be recovered. *Schmidt* v. *Christy*, K.B.D. 31st March. 38 T.R. 627.

108. Indemnity Act, 1920, secs. 1 and 2. Petition of right was brought before the above Act for the loss of a ship requisitioned and sunk by enemy action. *Held* that the Indemnity Act applied and that the petition must be discharged. *Attorney-General* v. *Royal Mail Steam Packet Company*, H.L. 12th May. 38 T.R. 658.

109. Sale of goods—delivery. Wine was delivered by carriers at the purchaser's premises as instructed. The person who received it was unauthorised, and embezzled it. *Held* that there was no negligence on the part of the seller, and that the purchaser must pay. *Galbraith & Grant* v. *Black*, K.B.D. 25th May. 38 T.R. 669.

110. Private international law—administration—domicile. Deceased was domiciled in the United States, but left property in England. Administration was taken out both in America and in England. There was a deficiency in America but a surplus in England. The American debts were statute-barred in England, but not in America. *Held* that the surplus assets must not be transmitted to America but administered in England. *Re Lorillard—Griffiths* v. *Cudforth*, C.A. 18th May. 38 T.R. 666.

111. Trade Marks Act, 1919, sec. 12—Schedule II., Trade Marks Act, 1905, sec. 62. The words "Unis—France," printed inside a circle or an oval curve, allowed to be registered as a trade mark for French goods in all classes. *Re Union Nationale Inter-Syndicate des Marques Collective*, C.A. 17th May. 38 T.R. 664.

112. Nullity of marriage. Incapacity to conceive is not a ground for a decree of nullity of marriage. *L.* v. *L.* (*otherwise D.*), P.D. 25th May. 38 T.R. 697.

113. Bankruptcy (Scotland) Act, 1913, secs. 5, 11, and 13. Bankruptcy Act, 1914, secs. 1 and 7. A bankruptcy notice was served in England, and during its currency the debtor obtained sequestration in Scotland. *Held* that the debtor could not by his own act destroy the effect of the bankruptcy notice. *In re a Debtor*, C.A. 12th May. 38 T.R. 683.

114. Apportionment Act, 1870, secs. 2 and 5—interim dividend. It is essential that such a payment must be declared to be made in respect of some definite period, to be apportionable. *Re Jowitt—Jowitt* v. *Keeling*, Ch.D. 24th May. 38 T.R. 688.

115. Estate duty. Finance Act, 1894, secs. 1, 2, (1) (*b*), 2. Finance Act, 1896, sec. 15. No. 219, vol. xxxvii., 37 T.R. 999, reversed, and *held* that the annuity in question was granted for full consideration in money or money's worth, and that estate duty was not payable on the death of the annuitant. *Attorney-General* v. *Earl of Sandwich*, C.A. 30th May. 38 T.R. 703.

116. Railway—common carrier. Damage was done to felt hats by carboys of chemicals in transit by rail from Tilbury Dock to Luton. The railway company paid the damages and sued the consignors of the carboys. *Held* that the railway company were, as common carriers, liable for damage to the hats, and had a remedy against the owners of the carboys on account of negligence and breach of warranty. *Great Northern Railway Company* v. *L. E. P. Transport & Repositories, Ltd.*, C.A. 24th May. 38 T.R. 711.

117. Marine Insurance Act, 1906, sec. 4, Honour Policy—subrogation. Such a policy is a mere bet, and is prohibited by the Act, and no right of subrogation arises under it. *Edwards & Company, Ltd.* v. *Motor Union Insurance Company, Ltd.*, K.B.D. 24th May. 38 T.R. 690.

118. Agent and principal—lien. A bought a motor car from B, who had previously had it reconstructed by C, B surreptitiously removed it without payment. A lodged it again with C for repair, and C claimed a lien for their old account. *Held* no lien. *Pennington* v. *Reliance Motor Works*, K.B.D. 24th May. 38 T.R. 670.

119. Factors Act, 1889, sec. 2, Mercantile Agent—*animus furandi*. A entrusted his motor car to B for sale at a price. B had the *animus furandi ab initio*. B sold to C, C to D, and D to E. A sued E for recovery of his car. *Held* that he was entitled to recover. *Folkes* v. *King*, K.B.D. 2nd June. 38 T.R. 731.

120. Marine Insurance—scuttling of ship—mortgagees, rights. A ship was scuttled with the connivance of the owner. *Held* that innocent mortgagees were entitled to recover under their marine risk policy. *Graham Joint Stock Shipping Company, Ltd.* v. *Motor Union Insurance Company, Ltd.*, K.B.D. 20th June.

121. No. 92, vol. xxxvii., 37 T.R. 85 and 340, affirmed. Trading with the Enemy (Amendment) Act, 1916, secs. 1 to 4—vesting of

enemy shares in custodian—payment of dividends. *Held* that the dividends which had accrued during the war must be accounted for to the public trustee as custodian. *Aramayo Francke Mines, Ltd.* v. *The Public Trustee*, H.L. 26th June.

ACT OF SEDERUNT

FURTHER AMENDING C.A.S., BOOK M., CHAP. V., SEC. 1, AND SCHEDULE A, ANENT FEES PAYABLE TO TOWN-CLERKS UNDER THE LICENSING (SCOTLAND) ACT, 1903.

EDINBURGH, 21*st June* 1922.

THE LORDS OF COUNCIL AND SESSION, in respect that an application under and in terms of the Licensing (Scotland) Act, 1903 (3 Edw. VII., cap. 25, sec. 27 (3)), has been presented by the Lord Advocate representing that the Fees payable to Town-clerks for work done by them as prescribed by C.A.S., Book M., Chap. V., Sec. 1, and Schedule A, as amended by the Acts of Sederunt of dates 26th February, 1920, and 9th July, 1921 (allowing a temporary increase of 20 per cent. on the Fees in said Schedule A), are still inadequate and should be further increased, having considered said application and finding a further increase justified, DO HEREBY further AMEND said C.A.S., Book M., Chap. V., Sec. 1, and Schedule A., by authorising a further increase of 30 per cent. (in addition to the 20 per cent. increase authorised by said two amending Acts of Sederunt) upon the Fees prescribed by said Schedule A: and DECLARING that this Act of Sederunt shall come into force on the 1st November next, and have full force and effect down to and including 31st October, 1923.

And the Lords DIRECT this Act to be entered in the Books of Sederunt and to be printed and published in common form.

J. A. CLYDE, *I.P.D.*

FEES IN COURT OF JUSTICIARY AND COURT OF SESSION.

His Majesty's Stationery Office has published Part II. of the report of the Committee appointed by the Secretary for Scotland on 11th November last to consider how and to what extent Scottish Law Courts fees payable to H.M. Exchequer might be raised. Part I. of the report, which dealt with Sheriff Court fees, was published in February last. Its recommendations were adopted in their entirety, and effect was given to them by Act of Sederunt dated 22nd February, which came into operation on 1st April last.

The second and concluding part of the report, now published, deals with fees in the Court of Justiciary and the Court of Session. It is not proposed to alter or increase fees in the Court of Justiciary. The increases recommended in the Court of Session are numerous, but it appears from a tabulated statement of the probable financial effect of the Committee's proposals that, even with the suggested increases, the income from fees in the offices of the Court of Session, other than those of the Accountant of Court and the Keeper of the Books of Council and Session, will fall far short of the salary costs of these establishments. The principal increases proposed are for original petitions and summonses, from the present fee of 15s. to one of £2 in the Inner House, and from 10s. to £1 in the Outer House. New fees are suggested for special cases, closing record, and hearings. It is also recommended that proof fees, at present charged according

to the number of witnesses examined, should be charged on a time basis at the rate of 10s. per hour.

The draft Act of Sederunt which constitutes the appendix to the report includes fee tables for the offices of the Accountant of Court and the Keeper of the Books of Council and Session, which have hitherto had separate fee tables. The increases proposed in these offices are small, but, owing to the number of transactions, the estimated additional yield from them is more than that expected from the more numerous and larger increases in the other offices of the Court.

As a set-off to these increases, it is proposed that the fees at present paid by litigants to macers should be abolished, and that the present macers should be offered a suitable annual allowance in commutation of these fees.

The Hon. Lord Blackburn was chairman of the Committee, which otherwise consisted of Sir James Adam, K.C., King's and Lord Treasurer's Remembrancer; Mr. John Prosser, W.S., Crown agent; and Mr. Irvine Reid Stirling, S.S.C. Mr. E. E. Parker, of H.M. Exchequer, acted as secretary to the Committee.

Appointments, Business Changes, &c.

ABERDEEN.—At a general meeting of the Society of Advocates held to-day Mr. Eric W. H. Brander, M.A., LL.B., of the firm of Messrs. Brander & Cruickshank, advocates, was admitted a member.

ANNAN.—Mr. William Cruickshank has been appointed Procurator-Fiscal for the burgh of Annan, in place of Mr. George Mitchell, resigned.

EDINBURGH.—Mr. Andrew Henderson Briggs Constable, K.C., Solicitor-General for Scotland, has been appointed one of the Senators of the College of Justice in Scotland, in place of the Right Hon. Lord Salvesen, resigned.

Mr. William C. Johnston, of Messrs. Beith & Murray, W.S., has been appointed Collector of the Writers to the Signet Widows' Fund, in place of the late Mr. Charles Cook.

Mr. Ernest M. Wedderburn, W.S., has been appointed Professor of Conveyancing in the University of Edinburgh, in place of Mr. J. L. Mounsey, resigned.

Mr. John H. Romanes, W.S., has assumed as a partner Mr. James Rutherford Brownlee, solicitor. The business will be carried on at 20 Queen Street, under the firm-name of Romanes & Brownlee, W.S.,

The business of Messrs. Clark & Macdonald, of which firm the sole partner, Mr. Norman J. Macdonald, died last month, will be carried on by Mr. Allan M'Neil, S.S.C.

S.S.C. SOCIETY.—The following office-bearers have been re-elected for the ensuing year:—President, Mr. William Considine; Vice-President, Mr. W. J. Lewis; Treasurer and Collector, Mr. D. Winter Robb; Librarian, Mr. Alfred N. G. Aitken; Fiscal, Mr. R. H. James; Secretary, Mr. Alexander Wyllie.

HAMILTON.—Mr. John Barrie, Larkhall, has been re-elected Dean of the Hamilton Society of Solicitors for the third time. Mr. M.

Walker, Hamilton, who has been Secretary for twenty-six years, has been again elected.

Melrose.—Mr. A. Murison Small has assumed Mr. Norman Ramsay Macpherson, W.S., as a partner. The business will be carried on under the firm-name of Small & Macpherson.

Faculty of Procurators in Glasgow.—The annual general meeting of the Faculty of Procurators was held on 1st June—Mr. James Andrew, Dean of Faculty, in the chair. The Dean, before proceeding to the regular business of the meeting, called attention to the loss of members which the Faculty had sustained since the last annual meeting. In addition to the ten members mentioned in the report, two had died since the report was issued, viz., Mr. Nicol Ferguson Cameron and Mr. James Boyd.

The following law agents were admitted members, viz.:—Robert Wodrow Anderson, John Alexander Headrick, John Robert Renwick, Thomas Randall Anderson, LL.B.; and Ninian Bannatyne Stewart, LL.B.

Railways Amalgamation.—The Dean, in submitting the annual report and accounts, said there were a number of other subjects at present before the Council which would require serious consideration, for instance, in connection with the amalgamation which was to take place between Scottish railway companies and English companies under the Railways Act, 1921, the question as to the effect of the amalgamation schemes on the shares and stocks of the Scottish companies fell to be considered. It had been supposed that the stock of the amalgamated company would become the stock of the English railway company, but in that case the rights of Scottish trustees to have their names entered as such, with power to act by a quorum, would be lost. In these circumstances the Council had appointed a committee, consisting of Dr. Gillies, Mr. Newlands, Mr. Buchanan, and himself, to deal with the matter and co-operate with other societies or other bodies interested in it, with the view of maintaining the present rights of Scottish trustees. It was considered that one suitable method would be to appropriate or earmark part of the stock of the amalgamated company to represent specifically the stock of the constituent Scottish company, such stock having a distinctive description, but no distinctive rights merely because of its special description. The committee would do everything possible to secure this desirable object. Then, in regard to registration fees of deeds in the Sasine Register, the proposal for an *ad valorem* charge was unworkable, and a joint committee of the legal societies, including the Faculty, had taken this matter up with the view of getting an amendment.

The Dean then moved the approval of the treasurer's accounts, a copy of which was annexed to the report, which was adopted. He further moved a vote in aid of the library, and the reappointment of the auditors of the treasurer's accounts for the current year, which was also adopted.

New Dean Appointed.—The next business on the agenda was the appointment of a new Dean. Mr. Andrew stated that he had received whole-hearted support during his term of office from the members of Faculty, the Council, and the officials, and thanked the Faculty for the honour they had done him and the pleasure they

had given him in acting as Dean. As they were aware, Mr. Timothy Warren had been nominated for the office of Dean, and no other nomination having been received, Mr. Warren fell to be appointed by the meeting, and he had pleasure in moving that he be appointed. This was seconded by Mr. John Jackson Coats, and the meeting unanimously appointed Mr. Warren. On the motion of Mr. Coats, seconded by Dr. Mackenzie, a vote of thanks was awarded to Mr. Andrew for his services in the chair during the last three years, and it was resolved to continue him in the chair for the current meeting.

Incorporated Society of Law Agents in Scotland.—A meeting of the council was held in Edinburgh on 22nd June, Mr. Patrick Cooper, advocate, Aberdeen, the president, in the chair.

Courts of Law Fees.—The council remitted to a committee to consider the report of the Departmental Committee, of which Lord Blackburn was chairman, on Fees in the Court of Justiciary and the Court of Session.

Sasine Office.—Attention was drawn to the unsatisfactory position of the Minute Book and the Search Sheet which in certain cases were not written up for periods of several months, thereby causing great delay in obtaining searches and even interim reports from the searchers, and also in the settlement of transactions. The council remitted to a committee to make enquiry into the circumstances and to report to next meeting.

Railway Act, 1921.—A report was submitted as to the joint meeting of representatives of legal societies recently held in Edinburgh with reference to the effect on stocks held by Scottish trustees and other investors in Scottish railway companies on the amalgamation of such companies with English railway companies. A suggestion that clauses be submitted to the Amalgamation Tribunal on the lines of Section 38 of the Finance Act, 1917, whereby Scottish confirmations did not require to be resealed in England in respect of War Loan stocks, and such stocks might be marked as trustee holdings was approved of, with the additional provisions that transfers to or by trustees in Scottish trusts might be executed by a quorum and that, where there was any change in the *personnel* of the trust, it should be sufficient to register the deed of assumption or minute of resignation, as the case might be.

Unqualified Practitioners.—Letters were read from members complaining of solicitors undertaking legal work for unqualified persons and sharing fees with them. The council appointed a committee to report on this subject to next meeting.

THE

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INCOME TAX CHANGES.

THE Finance Act of this year contains a further substantial instalment of the changes recommended by the Royal Commission, but these recommendations are certainly being subjected to a very piecemeal treatment. Many considerations have to be kept in view by the Chancellor of the Exchequer and the permanent officials associated with him in the preparation of the Budget. Parliamentary time is limited, and the line of least resistance has to be followed as far as possible. Thus it will be remembered how much opposition was threatened on a former occasion to certain proposed administrative changes, rather than face which the clauses were dropped. That is a somewhat ignominious position for a great public department to put itself in. Indeed, very much the same thing may be said of what has occurred this year in the case of the clause regarding supertax on the undistributed profits of certain companies. On that matter it became necessary to accept amendment after amendment in order to facilitate progress. One would think that experienced officials accustomed to the Parliamentary situation might have known in advance that the clause as originally submitted must necessarily excite the strongest criticism; but, on the other hand, one always has the suspicion that the thing may be deliberately designed so that many concessions may appear to be made, and yet leaving the Department at the end with all the powers they really wanted from the beginning. It is convenient to deal, first, with this change, namely—

SUPERTAX ON COMPANIES' UNDISTRIBUTED PROFITS.

It is further convenient to speak of this change as though it were limited to private companies, but strictly that is not so. It neither applies to all private companies, nor is it limited to them. It does not apply to any company, public or private,

which was registered on or before 5th April, 1914. It may apply to a company whose regulations do not prohibit applications to the public. It applies only to companies registered under the Companies Acts, 1908 to 1917, and therefore it may be avoided by registration abroad. The limitation to fifty members is subject to many special rules, and in particular a company with, say, thirty members and thirty ex-employee members is a private company under the Acts (if the other conditions are fulfilled), but, nevertheless, this new supertax rule does not apply to such a company; this may be deliberate, or it may have resulted from an oversight. The rule does not apply to any company where the "control" is distributed over more than five persons.

As the result of much discussion the section starts with a statement that what follows is enacted "with a view to pre-"venting the avoidance of the payment of supertax through the "withholding from distribution of income of a company which "would otherwise be distributed." This sounded all right at first, but reflection induces a doubt whether it accomplishes, or was officially intended to accomplish, what the critics demanded and what they thought had been conceded to them: that was that the section should not apply at all unless it was reasonable to draw an inference of fact to the effect that the non-distribution had been for the purpose, and with the design, of avoiding supertax. If the words quoted are carefully weighed it will probably be thought that there may well be two opinions whether any such legislative effect can be read out of the introduction.

The section can come into operation only if a reasonable part of the profits has not been distributed within a reasonable time and in such a manner as to make the distribution supertaxable income in the hands of the receivers. This is aimed at, *inter alia*, distributions in the form of bonus shares, which have been held not to be income for supertax purposes. In determining what is a reasonable amount to distribute or retain regard is to be had to current requirements of the business, and also to "such other requirements as may be necessary or "advisable for the maintenance and development" of the business.

If it is held that a reasonable amount has not been distributed, it is not to be supposed that the Department are to have power to compel any further actual distribution. All they can do is to assume a notional distribution which has no existence. This will be further notionally allocated among the members according to their rights and interests, and in

this way existing supertax liabilities may be increased, and supertax liabilities not otherwise existing may be brought into being.

In any accounting period in which supertax is levied on undistributed income corporation profits tax is waived.

The individuals actually liable are to be first asked to pay. If they fail, then the company must pay, but with right of relief against the individual. This relief might be enforced by action or by set-off against actual dividends.

Non-distributed income thus made liable for supertax may afterwards be actually distributed. When that happens it is not to be treated as supertaxable income on the actual distribution, for that would be double taxation. This may raise many questions of fact and law, and curious and hard cases.

The jurisdiction is with the special commissioners, subject to appeal to referees, and on legal questions to the Court. There is also provision for the useful intervention of a certificate by the auditor of the company if he is a member of an incorporated society.

The new rule applies for the first time to supertax in the tax year 1923-24. As supertax is a year behind, it applies to profits of the company in any accounting period ending after 5th April, 1922.

Revocable Trusts, &c.

We are not aware that it had ever been decided, but it was assumed administratively, that income tax and supertax liabilities were lessened by such arrangements as trusts for the benefit of persons whom the settlor was under legal obligation at any rate to maintain, and even though the trust was revocable at the pleasure of the settlor. This was almost absurd, and it has now been put on a more reasonable footing. The subject is treated in the Act in three branches. The word used is "disposition," and it includes not only actual transfer or delivery, but also any trust, obligation, agreement, or arrangement. These devices will not serve in any of the following cases:—

1. If the settlor is able, or has at any time since 5th April, 1922, been able, to undo the disposition without any consent, and this holds if the only consent required is that of the settlor's husband or wife and the spouses are living together. It will be observed that in this case it matters not when the disposition was made.

2. Dispositions made after 1st May, 1922, where the benefit is for a period which *cannot* exceed six years. There is an exception of cases where valuable and *sufficient* consideration

has been given for the disposition. It would appear to be a question whether, if such an arrangement is now made for seven years, it is effectual for tax purposes for the whole seven years or only for one year, but what passed in the Commons would favour the former view.

3. Cases where the benefit is given to a child (including stepchild and illegitimate child) of the settlor, and is for some period less than the child's whole life. But here there are a good many qualifications. Dispositions made on or before 5th April, 1914, are not hit. The disqualification applies only if and so long as the child is in minority and unmarried. And there are saving clauses in favour of cases where the benefit is to hold during the whole of the settlor's life or where the capital is settled on the child to take effect immediately on the expiry of the limited income benefit.

It need hardly be stated that these enactments have no effect on the rights of parties except as regards tax liabilities. The income in question is to be deemed for tax purposes to be income of the settlor, "and not of any other person." Newspaper correspondence shows that this has been misunderstood. Thus in the first case, if the person entitled to revoke is in life, it will be his income; if he is dead, there is no power to revoke, and the section does not apply. In the second and third cases the section applies only if the settlor is living. In the second and third cases, but not in the first case, there are provisions for adjusting the tax burden between the settlor and the beneficiary *inter se*, subject to the final decision of the general commissioners.

Untaxed Dividends, &c.

This refers chiefly to income on such securities as the 5 per cent. War Stock and other Government stocks in which the dividends are paid gross, subject to direct assessment under Schedule D. The rule of assessment is that the measure of charge is last year's income of that nature, and there is a decision that, if there was no such income last year, there can be no tax this year, although there is such income this year. This is altered by making the first year taxable on its own amount, subject to certain involved qualifications.

Schedule E.

All employees (not being "weekly wage earners") are transferred to this schedule. That settles the vexed question of the right to the three years' average, for the charge is now always on the income of the year of assessment. To this there is an exception in the case of "perquisites," which are tax-

able, in the option of the taxpayer, on either last year's amount or the average of the three preceding years. In this connection it is very important to note that it has just been decided in the Court of Session that a commission salary is a perquisite. In Schedule E cases the appeal may now, in the option of the taxpayer, be to the special commissioners.

Farmers' Tax.

This is not by any means an accurate, but it is the common, way of describing Schedule B. The changes are that land used for husbandry is to be charged at the amount of the rent (not double the rent as in recent years), and that land used for other purposes is to be taken at one-third of the rent (not a full year's rent as in recent years).

Repairs, Management, &c.

Here we have two changes, but both are postponed to next year, 1923-24. They are—

1. *Implied Rule.*—This is limited to houses and buildings other than farmhouses and other farm buildings. The flat rate of one-sixth automatic deduction to which we have been accustomed is now to give place to a sliding scale of one-fourth when the assessment does not exceed £20, one-fifth when it does not exceed £40, and one-sixth when over £40.

2. *Relief Claim.*—This applies to land, farmhouses, and other farm buildings, and houses generally. When the implied rule above stated does not give full relief against the cost of maintenance, repairs, insurance, and management, a claim for "excess maintenance" may be lodged. The calculation is on the average of the preceding five years, but exceptions are allowed to that rule. The new boon is to be that there shall be no rent limit. Extensions are not passed as qualifying for the relief, and the same applies to improvements, but it was explained in the House that, in instructions to officials, emphasis would be laid on the view that this bar against improvements must be carefully applied so that no prejudice shall be sustained by the taxpayer because, for instance, when extensive reinstatement has to be effected, the work is done in accordance with improved modern ideas.

Trust Residuary Income.

This touches a matter which will, we think, not be well received in Scotland. It is a legislative reversal of a decision of the English Courts against the Barnardo Homes in a case where a share of residue was bequeathed to that charity. The English idea is distribution at the end of a year from the death

of the testator, but in that case there were circumstances which caused delay beyond that limit without fault anywhere. Of course, income was coming in during the full period between the death of the testator and the date of distribution, and all that income went into the accounting, and the ultimate sum paid over to the homes included their proper share of that income. Accordingly, the charity applied for total refund of what they very naturally called their share of the tax paid on the income, but this claim was refused through all the Courts. The ground was that the only bequest to the homes was a share of the residuary fund when ascertained, and that until that fund was ascertained the income was income of the trustees and not of the beneficiaries. This is now altered by the Finance Act, but only in favour of charities, and, even as regards them, only as regards tax on income accruing after the expiry of one year from the testator's death. It would be all the same though the whole residuary fund was bequeathed to one legatee. Now, all this is contrary to our conceptions in Scotland, and also to the practice here. From actual present experience we know that, rightly or wrongly, the Barnardo decision is not treated as binding in Scotland, whether as against charities or any other legatee, and whether as regards the first year or after. In our judgment the practice in Scotland is right in Scotland, but it is not a little difficult to maintain that view in face of sec. 30 of the Finance Act, 1922.

Miscellaneous.

Allowances from the Pension Ministry to a war widow in respect of children are not to be reckoned part of the lady's income; but this is not expressly retrospective. Royalty owners are allowed to deduct the reasonable expense of management and supervision of the minerals. Ulster savings certificates are exempt when held by persons resident and domiciled in Northern Ireland. The exemption of superannuation contributions is strengthened, subject to deduction of tax at the source in the event of those contributions being repaid. Interest paid on postponed excess profits duty is not a trade deduction.

PHOTOGRAPHS AS EVIDENCE.

The production of photographs has now become an ordinary incident of legal proceedings. They are produced either of consent, or the photographer is called by one of the parties and depones to the production being a correct photograph. The cases in which recourse is usually had to photographic evidence are damages actions, infringements of patents, forgery

cases, and, in criminal law, where questions of personal identification are at issue.

Notwithstanding the frequent use of photographs, there is little or nothing said in the standard works on evidence as to their proper value as an element in proof. On this account we have read with particular interest an article from the *Central Law Journal*, U.S.A., containing a careful expert discussion of the value of photographic representations. Obviously the writer has been concerned chiefly with the examination of documents, and his experience of thirty-two years has shown him, not only wherein photographs are reliable and of value, but also the dangers arising from the extreme ease with which they may accidentally become, or be intentionally made, unreliable and misleading, and therefore worse than of no value. He gives a technical discussion which those versed in photography can alone adequately appreciate, but the following points from his paper will specially interest our readers.

A photograph is a correct representation of that which the camera sees, and as the camera sees same; but this by no means settles that the camera actually sees all that is before it, or sees in a truthful form that which is there: as to these points the result depends on many factors calling for thoughtful consideration on the part of both bench and bar.

The photographic process elementally consists of the chemical action of rays of light passing through a lens and falling upon a sensitised surface; but the action of rays of one colour differs from that of rays of another colour, and the action of different lenses also widely varies, and the sensitised surface is variously sensitive to different rays of light; add to these distinguishing characteristics the fact that light, lens and surface are subject to the will of the operator, and the further fact that the result will be greatly affected by any malposition of the camera parts, as well as of the camera itself with respect to the object, and you introduce a whole series of human factors of variance into that which was supposed to be the surest and most automatic of processes—and this even when only a complete and correct copy is being sought.

Surely these conditions show the easy possibility of unintentional inaccuracy in the resulting photograph. In litigation, however, as the writer truly observes, partisan interests create partisan desires, and in such circumstances many things could be done in making the photograph to cause it to present such appearance as might be desired in order to bolster up a partisan claim.

The falsity of a photograph may be confined to some small detail (if that be sufficient for the purposes of the party), or it may extend to something of alarming extent. Hence—the writer is speaking from his own special experience—if the original document be not present, no photograph should be admitted as a substitute until its every partial process and the full history of its manipulation be fully inquired into; and if the original document be also present, then no photograph should be allowed to be used to supplement same until and unless the two be carefully compared and found to agree, or are satisfactorily explained where they showed any varying appearances.

"Do you think," he asks, "that a false photograph of a "document is an impossibility? If so, just turn over the "leaves of any illustrated magazine or book or advertising "folder, and almost every fancy heading and picture that "you find therein will be proof of the easy possibility of such "a thing. Or hunt up some business letterheads of promoters "of industrial concerns purporting to give a picture of their "locations or plants, and you will find the same result. They "are practically all based on photographs of the actual "objects, such as views, buildings, or drawings, yet have all "been more or less altered to suit the idea of the interested "parties, and rephotographed and printed—and when com-"pleted there is little or nothing to indicate the manipulation, "unless you have a chance to examine and compare the "resulting print with the original object. Or think of the "moving-picture film as another instance; it is cut, spliced, "and changed in any way desired, yet the changes are not "observable to you when the finished film is projected on the "screen before your eyes, and many people would not know "that such changes had ever been made."

In order to test the genuineness of the photograph, five points of inquiry are suggested—(1) the type of lens used; (2) the lighting of the object; (3) the position of the object; (4) has there been retouching and tampering; and (5) has there been enlargement. Even though a photograph has stood the test of all these inquiries, and is free from all suspicion in these respects, there are still other reasons why such photographs should be received with unusual caution—(*a*) they are absolutely unfit for high-power microscopic examination; (*b*) they are necessarily based on a process of selection, and, of course, the person relying on them will not go to the trouble of presenting that which is unfavourable to him, but will gather together, and try to accentuate, only such features and

parts as are favourable to his claims; and (*c*) they naturally, and at most, can only reproduce the general pictorial form of the original—the weakest proof of all, because no forger will put into circulation anything that is not near enough the form of the genuine to make him think it will pass muster as such in the eyes of the average man.

The conclusion which the writer comes to in his examination of this important subject is that if open to none of the foregoing objections and subject to the limitations set forth, a photographic copy of a document is most excellent as a mere record of its contents and general appearance, but even then it should not be used in place of the original or go in evidence when the original is procurable; it should not be allowed to be used, under any conditions, until it has been shown in detail to be unobjectionable. Of course, if its presentation and use are admittedly only for the purpose of illustration, and not as proof, then (when fully explained and accounted for) it could very properly be so used, provided the jury was expressly cautioned that it need not be accepted as a truthful representation of the document just because it was produced by photographic means, but was being used merely by way of illustrating other testimony.

Therefore, while photographs may be eminently useful in legal proceedings, they ought not to be rashly accepted, either as proof or as illustration, without first being fully explained and accounted for, and the specific use to be made of them spread on the records; and—above all—they should not be accepted as entirely accurate representations of the original objects unless such fact be first absolutely established by proof. "On the whole, they may be most excellent servants "of a litigant; but every one other than the employer should "remember that the best of servants (like the famous dog) "'knows his master's voice,' and will do his master a good "turn even at the expense of the latter's associates: and it "should not be forgotten that the most dangerous of lies is "the near-truth."

THE PLEADER.

We notice an interesting series of cases as to the responsibility for vessels breaking loose from their moorings and causing damage. In *Caledonian Railway Company* v. *South Alloa Shipbreaking Company*, First Division, 1st July, 1922, the defence was that the vessel was moored under the direction and supervision of the pursuers' harbourmaster in a negligent and unseamanlike manner, considering the place where she

was berthed, and that the jetty was in a dilapidated condition, the rings to which some of the moorings were attached being unsuitable to withstand the strain put upon them. In repelling this defence the First Division judges were emphatic that responsibility for berthing could not be laid on the harbourmaster unless, as Lord Mackenzie stated, " there was some " special danger about the berth known to the harbourmaster, " but unknown to the shipowners."

Then, in the English case of *The " Wentworth,"* *Times* Law Report of 11th July, 1922, the defence was that the cause of her breaking loose was an act of God, the extraordinary force of wind and tide. Mr. Justice Hill found that the master of the " Wentworth " had not been guilty of negligence. In giving judgment for the defendants, he said that the Elder Brethren advised him that, having regard to the exposed position of the " Wentworth," it would have been more prudent if reliance had not been placed only on manilas, coirs, and wires, however good and however well placed, but, in addition, cables had been carried to the jetty. Upon the evidence, he thought it would be greatly too high a duty to place on the defendants to find them negligent in using such moorings as all the masters on the spot agreed in thinking sufficient. After the experience of this case, the standard of reasonable care might rise. During the last twelve months there had been an unusual experience of large ships which were light being laid up and being moored in all sorts of situations, and a good deal of experience had been gathered during that time, which had been partly acquired by that Court, and acquired in a greater degree by those who had had to do directly with the management of such large ships at moorings. He did not wish the decision in the present case to be used in the future as any justification for such vessels in such situations relying only on mooring ropes and not using some form of chain cable to make certain. Judged, however, by the standard of December, 1921, he was not prepared to say that the defendants had not established their defence.

In the Sheriff Court case of *Crockett* v. *Stornoway Harbour Commissioners*, 1922, 1 S.L.T. 65, which was decided before the above-mentioned judgments were issued, the responsibility for berthing was held to lie with the shipmaster, unless there was some latent danger connected with the berth. In this case, however, we must say we regret the result arrived at. The ship which broke loose was injured by a partially submerged wreck adjoining her berth. The Sheriff found that, as the shipmaster went into this berth with his eyes open, he,

as it were, accepted the risk. To our mind it seems there was a prior question of negligence. Why did the Commissioners leave this wreck lying in the harbour so long? It was a special danger which it was their duty to remove, and we respectfully think that the only competent defence to them would be that they were unable in the interval to obtain appliances to remove or for some such valid excuse; but obviously, as the wreck had been there so long, no such excuse could be pleaded, and does not appear to have been pleaded. A public body which allows a danger to exist in a public place over which it has the duty of supervision should be strictly dealt with if damage results.

There have been several cases lately in which, after the proof was closed, it was reopened on a minute of *res noviter*. Generally speaking, it would appear that the Courts are becoming more indulgent to such minutes than formerly. In *Cook* v. *Crane*, 1922, 1 S.L.T. 397, the Sheriff-Substitute refused the minute proposed, but it was allowed by the Sheriff, and his judgment was upheld by the Second Division.

At the hearing on appeal a new aspect of this question of *res noviter* was brought out which would appear to disclose a new statutory power in the Sheriff, independent of the question of *res noviter* proper. The Sheriff Courts Act of 1913 provided for the insertion, at the end of sec. 27 of the Act of 1907, of the following words:—"It shall be competent for the "Sheriff, when the action is before him on appeal on any "point, to allow further proof." In the case referred to the Sheriff held that the minute propounded disclosed a case of *res noviter*, but the Second Division treated the matter as if the Sheriff were exercising his statutory discretion to allow further proof.

The following statement of the past and present law of the subject, from the opinion of Lord Hunter, should be noted:—
"Prior to the Act of 1876 the procedure in the Sheriff Court "was regulated by an Act of Sederunt of 1839, the 83rd section "of which provided, 'When a proof is reported, and an inter-"'locutor pronounced thereon, no further proof shall be "'allowed, except upon very weighty reasons shown . . .
"'When such further proof is applied for, the facts, and the "'witnesses by whom they are to be proved, must be particu-"'larly condescended on in the petition craving the addi-"'tional proof.' Some of the cases to which we were referred "were cases under that Act of Sederunt. But the Sheriff "Courts (Scotland) Act of 1876 made what I cannot help "thinking was a substantial difference in the position, be-

" cause it was provided by sec. 28, sub-sec. (3), of that Act " that ' it shall be competent for the Sheriff, where the action " ' is before him on appeal on any point, to open the record " ' *ex proprio motu*, if the record shall appear to him not to " ' have been properly made up, or to allow further proof.' " So far as I can see, no qualification on the allowance of " proof was made by the statute, although I do not for a " moment doubt that the exercise by the Sheriff of the power " so conferred upon him was a power that he had to exercise " judicially. Unless good and substantial cause was shown " for the allowance of further proof, I take it that the Sheriff " would not have allowed such proof. Assuming that the " Sheriff apparently unwisely exercised his discretion, then " the Court of Session would no doubt be entitled to put him " right. But that is not the case made here. When the Act " of 1907 was passed, an entire omission was made to give " the Sheriff such powers as he had under the Act of 1876. A " correction, however, was made by the Act of 1913. Under " the 27th section of the 1907 Act, as amended, it is provided, " just as in the Act of 1876, that it shall be competent for the " Sheriff, when the action is before him on appeal, to allow " further proof."

Literature.

THE LAW RELATING TO THE POOR AND TO PARISH COUNCILS. By J. Edward Graham, K.C. New edition. Edinburgh: Wm. Hodge & Co., Ltd. (Price 31s. 6d. net.)

We welcome this new edition of Mr. Graham's book as the only treatise dealing exhaustively with the modern Scottish poor law and its administration. Although the statutory changes in the poor law since the last edition in 1905 have been small and are effected principally by the Mental Deficiency and Lunacy (Scotland) Act, 1913, and the Poor Law Emergency Provisions (Scotland) Act, 1921, yet a cursory examination of the cases very fully and accurately digested in Part I. of the book shows that the development of the law by decisions of the Court has been considerable. Indeed, most of Part II. of the book dealing with administration and settlement has had to be written afresh. As throwing light on the meaning of the provisions of the Mental Deficiency and Lunacy Act of 1913, Mr. Graham most helpfully cites the English decisions on the corresponding sections of the English Act of that year. Full use has also been made of the growing body of arbitrations by the Scottish Board of Health as reported in the Poor Law Magazine. Mr. Graham's book is the only work we know of where the general practitioner can quickly obtain access to the

results of these arbitrations. This is undoubtedly the standard work on the poor law.

Obituary.

At Bonanhill, Strathaven, on 12th July, Mr. Alexander Ross, of Messrs. T. J. & W. A. Dykes, solicitors, Hamilton. After receiving a training in a Glasgow office, Mr. Ross went to Hamilton in the early eighties as principal assistant to Messrs. Dykes. He was afterwards assumed as a partner, and later on became the head of the firm. He was a former Dean of the Society of Solicitors of Hamilton, and he held a commission as an Honorary Substitute for Lanarkshire.

At Oban, on 11th July, Mr. William Wallace, C.B.E., who for seventeen years acted as Sheriff-Substitute in Argyllshire, aged sixty-two. Mr. Wallace was born in Glasgow, and was educated at the Academy and University there. In 1888 he was called to the bar, and in 1904 he was appointed Sheriff-Substitute at Campbeltown, from which office he was promoted in 1910 to Oban. Mr. Wallace was well known for his contributions to legal literature, being the author of standard works on bankruptcy, the practice of the Sheriff Courts, banking, &c. He edited the Trial of the City of Glasgow Bank Directors, which appeared in the Series of Notable Scottish Trials. For his untiring and valuable services in connection with the war he was decorated with the Order of Commander of the British Empire.

At Edinburgh, on 24th July, Mr. Harry Havelock Macbean, W.S. Mr. Macbean was admitted a member of the Writers to the Signet in 1883.

Notes from Edinburgh.

Parliament House, 31*st July*, 1922.

The closing stages of the summer session witnessed proceedings symptomatic of either bad management or an unkind interference by Fate with the final act in the programme of the Court, and the member of Parliament who recently called in question the necessity for filling up the vacancy on the bench caused by Lord Salvesen's resignation has had his answer in the mix-up experienced during the last two weeks of session. Lord Anderson's protracted criminal trial at Jedburgh of the charge of incendiarism might have been fixed for a more convenient time than it was, though it is true that trial had already been postponed; but why the last week of the session should have been chosen for a sitting of the Justiciary Appeal Court, which robbed that short week of a working day

for the Second Division, it is not easy to understand. The Lord Justice-Clerk was required in London for sittings of the Privy Council appellate bench just at the time when the Court of Session needed every available judge, and no doubt his lordship's absence, concurring with that of Lord Anderson at Jedburgh, had something to do with the interruption of the disposal of the "legitimate" business of the Second Division. When a long vacation is approaching, the loss of even a single working day entails delay and disappointment to litigants with pressing needs, and to give preference to Justiciary appeals which concern technical quibbles in procedure well able to stand postponement, does not seem to be a good business arrangement.

Long before the swish of the Geddes axe was heard in the land the long vacations enjoyed by the people composing the Court of Session attracted many disapproving eyes to that establishment. Futile in many respects, the axe is not going to leave that institution entirely alone, and some more or less violent hands may yet be laid on the hitherto sacred period known as vacation, whereby more work will be got in return for the wages bill than has been the case, though how this is to be managed cannot readily be seen, even allowing for a reduction of the establishment. All the same, the vacations should be utilised more than they are for the sittings of the Justiciary Appeal Court, the Lands Valuation Appeal Court, the Railway and Canal Commission, and other side lines which interfere during session with the conduct of civil business.

The labours of Lord Blackburn's Committee, appointed to revise the fees in the various legal departments in Scotland have met with the approval of the Court, which, on 20th July passed an Act of Sederunt regulating the fees to be collected in the Court of Session and kindred offices as from and after 1st October next. This Act of Sederunt will be found printed in this issue of the Review, and a careful study of its financial imposts may be recommended to those who are wondering what has been and is being done to attract more custom to the Court than has been experienced during the past five lean years. For healthy pre-war days the table of new fee-fund dues might have done all right, for litigation was then gone about in the proper spirit, and it is unfortunate that the present time of slump should have been chosen for the introduction of discouragement to litigants, who in fair numbers will, in preference to patronising the Supreme Court, seek the cheaper tribunals of the Sheriff Courts, for the increases in some instances run to more than 100 per cent., though it is true that in many instances small fees have been left alone which might

without cavil have been doubled; while possible sources of revenue have not been tapped at all, such, for example, as the impost of an *ad valorem* fee on the condescendence of the fund *in medio* in multiplepoindings, and of a substantial fee, also *ad valorem*, on estate and funds permitted to be transferred under petitions when purposes under trusts and mortifications can no longer be carried out, to give but two examples. The theme handed to the Committee was the aiming at a self-supporting Court of Session, or at least as self-supporting a concern as might be possible, looking to the need of the nation for a Supreme Court of law, as allowed by the Union. Self-support for such a national institution is, of course, far out of the question, and the Committee was not expected to work any miracle. The misfortune which has fallen to the lot of the Committee is that its services were not asked to encourage a revival of litigation whereby profits by increased dues might result, but only to clap on increased dues, which in normal times might readily have been paid by the litigating public. A committee to seek means to encourage more resort to litigation would have been of greater use at the present time, and such a committee (assuming its composition to be of the practical sort) could have found a wealth of material to enable its members to present a report such as would have done more to bring in increased revenue than any report confined to the tinkering with fee-fund dues is likely to do.

The new Solicitor-General, the Hon. William Watson, K.C., was truly unfortunate in his first official experience in his exalted rôle, for the material provided for him in the criminal prosecution of the two unhappy creatures charged with what was known as the Tranent murder was of such a shadowy texture that he had, before leading all the Crown evidence, to withdraw the charge. There has been aroused in Edinburgh and district a feeling of indignation against the police authorities—those of Haddingtonshire—for having held the two men on the flimsy sort of evidence revealed at the trial; and the foreman of the jury, a well-known, level-headed citizen of the capital, has been constrained to adopt an unusual and rather irregular course by writing to the local press suggesting that some monetary recompense should be paid to the two victims of inefficiency. That feeling of indignation against the police may be justified, but the Crown authorities cannot surely be held to be entirely blameless in the matter, for, in a serious charge like murder, the investigations made by crude, if zealous, county police officials should be subjected to careful

tests and verification at headquarters. It is a humiliating position for the Crown to be put in that, because two witnesses do not on oath speak up to their precognitions, the whole fabric of the prosecution collapses. The English magisterial inquiry in cases like this has not much to recommend it in Scottish eyes, yet a magisterial inquiry with the witnesses on oath would have saved this prosecution on the capital charge, and saved also the prestige of the Crown, which has suffered. Lord Anderson was not unduly severe in his remarks concerning the conduct of the Haddingtonshire police in this matter, and the public feeling is that a great deal more might have been said by his lordship. On some occasions certain county police authorities in Scotland have earned high praise for the able manner in which they have investigated serious crimes. This Tranent affair earns no praise for anybody. To establish in Scotland a Metropolitan police force, to whom all serious crimes should be reported for investigation, might not go far to remove the feeling of self-assurance which obsesses provincial police officials, but it would ensure prompt application of workmanlike methods to the tracking of real criminals, and it would restore public confidence in police administration. In this affair two witnesses did not speak up to their precognitions. It would be interesting to know by whom and in what sort of manner those two were precognosced. An inquiry, in fact, seems to be called for in the public interest, for national sentiment in Scotland has been one of pride in the scrupulous fairness observed in the conduct of criminal prosecutions.

Pithy remarks have now and then come from the bench concerning the value of evidence given by skilled witnesses, and counsel invariably acquiesce in the judicial comments, knowing full well that what one lot of experts can be got to say on one side can be contradicted by an equal or greater number of experts on the other side. How, then, does it strike prominent pleaders to find themselves in the rôle of expert witnesses? It is satisfactory to learn that, whether or not they agree with the accepted legal ideas as to the value of the skilled witness, they can and do acquit themselves so creditably as to earn compliments from such a distinguished English pleader as Sir John Simon, K.C. In the case recently heard before Sir Henry Duke, where the matter in dispute concerned certain pencil alterations on a will executed in Scotland by a testator of English domicile, two leaders of the Scottish bar gave evidence on one side and the other respectively, the Dean of Faculty and Mr. Alex. Moncrieff, K.C., appearing as the skilled witnesses as to Scots law; and it has been reported

that in his speech on behalf of one of the parties Sir John Simon paid a high compliment to the competency of the Scottish lawyers who had given evidence in the case, and said he hoped that, if ever he found himself in the witness-box in Edinburgh, he would acquit himself as well if called on to deal with the laws of England. This graceful tribute will be appreciated in Scotland as being complimentary not only to the two distinguished legal representatives, but also to the honourable profession of advocate.

Six civil causes were tried by juries at the sittings, and the whole lot were disposed of by Tuesday, 25th July, the balance of success in obtaining verdicts being with pursuers, who, in four cases out of the six, got awards of damages, substantial save in one action. The motor vehicle accident predominated as a purveyor of jury cases, four of the six actions arising out of such accidents, while one case concerned an alleged defective Glasgow sidewalk on which a lady came to grief, and the remaining case arose from a venerable Glasgow roof, whose defective slates precipitated a chimney-sweep to the ground.

For the three weeks of July before the Court rose there were brought into the Inner House 23 new causes, whereof 15 went to the First Division and 8 to the Second Division. The 15 in the First Division were composed of 5 reclaiming notes, 3 appeals, 5 stated cases on appeal under the Workmen's Compensation Act, 1 special case, and 1 case stated by the Land Court; and the 8 in the other Division consist of 4 reclaiming notes, 1 appeal, 1 stated case under the Workmen's Compensation Act, and 2 remitted causes for jury trial. In the Outer House during that period 91 new summonses were received, and 25 of them are divorces. Lord Ashmore has 40 of the total, there being 8 divorces among them. Lord Sands and Lord Morison each have 18, with 6 divorces each; Lord Constable (who succeeds Lord Anderson, now in the Second Division), has 14, and 5 are divorces; and Lord Blackburn has 1, which is not a divorce action.

On 12th July an Act of Sederunt was passed, extending certain temporary increases of fees for the year to October, 1923, and it will be found printed elsewhere in this issue of the Review.

Notes from London.

The Temple, 31*st July*, 1922.

In the year 641, when the Caliph Omar captured Alexandria, the question was asked, what was to be done with the library

wherein was garnered the learning and wisdom of the ancient world. The matter was referred to the Caliph. That robust Musselman surveyed the huge collection with disdainful eye as he gave summary judgment, "Either those writings agree "with what is contained in the Koran, in which case they are "useless, or they teach some other doctrine, in which case "they are pernicious, as useless or pernicious, then let them "be destroyed," and so for the next six months the baths of the city were warmed by those precious treasures. For the past half-century or more our law givers have by a similar course of reasoning practically abolished an Englishman's right to trial by jury in civil cases. Judges who are men of superior ability, of careful training, of great experience, must know the rights and wrongs of a case far better than anybody else. If the jury merely follow the hints in his lordship's charge to them so as to give a verdict which is an echo of the judge's sentiments, they are useless, a mere clog in the wheel of justice; if they give a verdict contrary to the ruling they are pernicious, and so ought to be removed. Such were the arguments and sentiments of the late Mr. Justice Jelf, who was a brilliant and successful advocate and an able, though some thought a rather partial, judge. Other men in position agreed, though they did not express their views in such an outspoken manner, but they worked to give effect to them, with the result that right to trial by jury in civil cases has practically disappeared.

It has been already remarked in these Notes that far-reaching changes are sometimes brought about in the law without notice from the outside world. This is an example. The revolution has been a gradual one: in the England of an early day everything was done by the verdict of a jury. The system was not merely of great antiquity, but legal historians have never been able to explain exactly how it took the shape it finally assumed. However, in the common law Courts, in the Courts of the manor, in every species of inquisition taken by a coroner, the result was obtained through the verdict of the men in the box. Then in 1854 it became possible under the Common Law Procedure Act of that year to try cases by a judge alone. Then followed the Judicature Acts and a number of judge-made regulations, to-day embodied in that huge collection of rules and comments known to practising lawyers as the White Book. For many years you could have a jury simply by asking for it, yet if you did not demand it your case was tried by a judge alone. At length, by the Administration of Justice Act, 1920, sec. 2,

your right to a jury came to depend on the opinion of the Court. In a few cases, indeed, where fraud is alleged or something of a *quasi*-criminal character, the plaintiff still retains his right, but for the rest it is a matter of discretion whether he will have this privilege, once considered the inalienable right of Englishmen. In the two cases of *Ford* v. *Blurton* and *Ford* v. *Sauber* the matter came before the Court of Appeal on the 7th of this month. The actions were to recover money paid in gaming transactions—a frequent class of case at present—the master had allowed the plaintiff a jury, but Mr. Justice Swift, on appeal, had reversed the decision, and ordered trial by a judge alone. The Court of Appeal was a very strong one, consisting of Bankes, Scrutton, and Atkin, L.J.J. They found themselves obliged to dismiss the appeal, since the words of the statute and the rules were too plain to make any other decision possible, but Lord Justice Bankes, in doing so, carefully reviewed the history of the change begun in 1854 and culminating in the Administration of Justice Act, 1920. He was not afraid to criticise severely the destruction of the jury system, "the standard of much that is valuable in "the life of the community has been set by juries in civil "cases. They have proved themselves in the past to be a "great safeguard against many forms of wrong and oppression, "they are essentially a good tribunal to decide cases in which "there is hard swearing on either side or a direct conflict of "evidence on matters of fact, or in which the amount of the "damage is at large and has to be assessed." The learned Lord Justice then went on to plead for a reconsideration of the subject with a view to the restoration of the right of trial by jury to its ancient position.

The matter has not been allowed to rest; it has been agitated to some extent in Parliament, and most probably some action will be taken. It might be well for English lawyers to study the history of civil trial by jury in Scotland. In the north it was not introduced till 1815, and then chiefly through the exertions of Lord Chancellor Erskine, who declared he wished to bestow on his native land what experience had proved to him to be a blessing in England. The cynic might remark that Lord Chancellor Erskine, though in some respects a great man, was not a great lawyer, also he was miraculously successful with juries, which naturally made him think highly of the system. In Scotland juries never seem to be an essential part of the work of the Courts, although as late as 1907 they were introduced

into the Sheriff Courts in a limited class of cases, to wit, those between servants and masters. Perhaps they are both cause and effect of a different way of looking at things in Scots and English minds.

Some words must be said of the last stages of the Horatio Bottomley case. It is unnecessary to recall in detail the facts. On 29th May Bottomley was sentenced at the Old Bailey to eight years' penal servitude. At the beginning of this month his appeal against his conviction was dismissed by the Court of Criminal Appeal, and at the time of writing proceedings are being taken for his expulsion from the House of Commons. Of the rightness of his conviction there can be no doubt, but it may be seriously questioned whether the sentence was not more severe than was necessary. The verdict of guilty with any term of imprisonment, however short, was sufficient to destroy the career of the accused and prevent him from doing any further mischief. The danger of a maximum sentence is that it tends to excite a feeling of sympathy for Bottomley, which is a very undesirable result. The whole thing gives one the impression of the pricking of a bladder. His perfervid rhetoric in the dock fell quite flat; his impassioned statement that the sword of justice—the striking and impressive emblem suspended on the wall of the Central Criminal Court—would fall from its place if he were convicted could only provoke a smile or a sneer, and was passed by in contemptuous silence by the judge who tried the case. Mr. Justice Salter is a calm and careful judge, and the counsel who argued for Bottomley in the Court of Appeal, able though they were, could not bring any substantial objection to his conduct of the matter. He speedily disposed of the argument that all the money would have been replaced. Every apprentice who robs his master's till, he remarked, intends to replace the money. Perhaps the illustration went a little too far. The apprentice when he robs his master's till knows that he is there and then committing a crime, but when in June of 1919 Bottomley started the Victory Bond Club it is by no means likely that he then and there meant to defraud the men who were afterwards his victims. Bottomley is of that class of criminals which begin by deceiving themselves: from start to finish, no doubt, he meant to repay everything; he was a sanguine man, he was engaged in many schemes; had one or two been successful sufficient funds might have been provided and all would have been well. Many facts of his past life have been published since his conviction, and one now sees what was at least suspected long ago,

that it was right through a process of robbing Peter to pay Paul. His real crime was that he had obtained money from a number of individuals by statements which, whatever he may have thought, it was really impossible that he could without the happening of something little short of a miracle have made good. It is curious to reflect that a few short years ago a seat in the Cabinet seemed not beyond the bounds of possibility; yet his conduct then was very much what it had always been and continued to be till the end. There is little use in moralising over his fall. Honesty is the best policy, look before you leap, and so forth—why should one mumble those ancient maxims? In many ways he was a most able man, his legal knowledge in some directions was remarkable, and he would certainly have succeeded as a lawyer. However, there is an end of him. Possibly in the course of some years, if he survives the ordeal, he will be allowed to go free to spend the remainder of his days in unnoticed obscurity.

The approach of the long vacation finds the Divorce Court still congested. Lord Buckmaster has descended from the serene atmosphere of the House of Lords to those somewhat murky regions to give a helping hand. He is disposing of the undefended divorce list with marvellous celerity. On Monday, the 24th July, to give one example, he sat down at 10.30 a.m. to a list of seventy cases. Horridge, J., who began in another Court on the same day at 10.15 a.m. the same class of work, was content with exactly half the number. This was over one hundred for the day, and no lists, however swollen, can resist for long determined assaults of such a description. In connection with this it may be mentioned that divorce cases are in future to be heard at assizes as well as in London, but the reform is of a tentative and moderate character, for it only applies to undefended causes and those in which parties who are technically "poor persons" are engaged.

Lord Shaw, following the example of distinguished predecessors, has gone to America to address associations of American and Canadian lawyers; on law generally to the Americans, and on law as a link of Empire to the Canadians. Lord Haldane at home has been lecturing at Cambridge on the work for the Empire of the Judicial Committee of the Privy Council. No one doubts Lord Haldane's learning and ability, but he has been so immersed in the dark lore of the Hegelian philosophy that he has contracted now and again something of the obscurity of the master. It is an agreeable surprise to find him here, light and entertaining as well as

instructive. His account of a tribunal of which he has been such a *magna pars* both as advocate and judge is profoundly interesting.

NOTES OF ENGLISH CASES.

The following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

122. Principal and agent—Commission—*Quantum meruit.* A charter party for five years and relative agreement provided for payment to plaintiff brokers of commission on hire, and on sale at a fixed price. In eight months the ship was sold at a much lower price. *Held* (*a*) that the brokers were not entitled to commission on hire to end of charter, (*b*) nor to commission on sale, (*c*) nor to a *quantum meruit*. *Howard, &c.* v. *Manx S.S. Company*, K.B.D. 26th June. 38 T.R. 757.

123. Sex Disqualification (Removal) Act, 1919—writ of summons to peeress—(*a*) neither under the words of the patent nor under the above Act is a peeress entitled to a writ of summons to the House of Lords; (*b*) the rule that the words of an instrument should be taken most strictly against the party employing them does not apply to the Crown. *Lady Rhondda's Petition*, Committee for Privileges of House of Lords, 27th June. 38 T.R. 759.

124. No. 50, *supra*, 38 T.R. 184, reversed. Copyright Act, 1911, secs. 5, 6, 31. *Held* (*a*) that the plaintiffs were not a trade union; (*b*) that with reference to songs registered after the date of the assignation, plaintiffs were only equitable assignees and required the joinder of the registered owners to give them a title to sue. Time given to join them as plaintiffs. *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Limited*, C.A. 28th June. 38 T.R. 791.

125. Contributory negligence. Defendants sent a petrol tank barge to be repaired by plaintiffs. A workman entered the tank with a naked light, and was injured by an explosion. *Held* that there was contributory negligence, and claims by employers and workman dismissed. *Hodge & Sons, Ltd.* v. *Anglo-American Oil Company, Ltd.*—*Willmott* v. *The Same*, C.A. 30th June.

126. Liferenter and fiar—Indemnity Act, 1920. Compensation awarded for damage to a park on settled estates by Government occupation belongs to the liferenter without impeachment of waste. *Re Williams' Settlement—Williams Wynn* v. *Williams*, Ch.D. 30th June. 38 T.R. 789.

ACT OF SEDERUNT.

Extending Certain Temporary Acts of Sederunt Increasing Fees.

Edinburgh, 12*th July*, 1922.

The Lords of Council and Session, considering that the causes which called for the increases of Fees granted temporarily in the Acts of Sederunt set forth in the Schedule hereto annexed still hold good,

and it is therefore expedient that the increased Fees therein allowed be still continued, THEREFORE ENACT and DECLARE that the said Acts of Sederunt shall be extended, and have full force and effect down to and including 31st October, 1923.

And the Lords APPOINT this Act to be entered in the Books of Sederunt, and to be printed and published in common form.

J. A. CLYDE, *I.P.D.*

SCHEDULE REFERRED TO.

1. Act of Sederunt amending C.A.S., Book M., Chap. I., Table of Fees, Part C., Section 1, anent remuneration of Bar Officers in Sheriff Courts, dated 16th July, 1919.
2. Act of Sederunt amending C.A.S., Book M., Chap. III., anent Fees in Civil Business for Sheriff Officers in Scotland, dated 22nd October, 1919.
3. Act of Sederunt amending C.A.S., Book M., Chap. V., Section 2 and Schedule B., anent Fees payable to Clerks of the Peace under the Licensing (Scotland) Act, 1903, or otherwise, dated 19th November, 1919.
4. Act of Sederunt amending C.A.S., Book M., Chap. V., Section 1 and Schedule A., anent Fees payable to Town-Clerks under the Licensing (Scotland) Acts, 1903, or otherwise, dated 26th February, 1920.
5. Act of Sederunt amending C.A.S., Book A, Chap. IX., Section 4, anent Fees payable to Messengers-at-Arms, dated 1st June, 1920.
6. Act of Sederunt authorising a further temporary increase in Fees under C.A.S., Book K., Chap. IV., and C.A.S., Book M., Chap. II., dated 26th July, 1920.
7. Act of Sederunt further amending C.A.S., Book M., Chap. V., Section 2 and Schedule B, anent Fees payable to Clerks of the Peace under the Licensing (Scotland) Act, 1903, or otherwise, dated 8th July, 1921.

J. A. CLYDE, *I.P.D.*

ACT OF SEDERUNT.

TABLE OF FEES PAYABLE IN THE COURT OF SESSION AND OFFICES CONNECTED THEREWITH. (As regulated by *Act of Sederunt*, 20th July, 1922).

THE LORDS OF COUNCIL AND SESSION, in pursuance of the power vested in them by the second section of the Courts of Law Fees (Scotland) Act, 1895, 58 and 59 Vict., c. 14, do, with the concurrence of the Lords Commissioners of His Majesty's Treasury, REPEAL Chapters II. and III., Book K., of the codifying Act of Sederunt 1913 as from and after 1st October next, and in lieu thereof ENACT and PRESCRIBE as follows:—

1. AMOUNT OF FEES CHARGEABLE.

From and after the 1st day of October next, the Clerks of Session, the Clerk of the Bills, the Clerk of Teinds, the Keeper of the Register of Edictal Citations, the Auditor, and the Extractor of the Court of Session, the Deputy Keeper of the Signet, the Accountant of Court, and the Keeper of the Books of the Lords of Council and Session, or any officer acting for any of them, shall be entitled to charge the

fees specified in the Table hereto annexed, and no other, until the same shall be altered in terms of law.

2. Fee to be Collected by Stamps.

The said fees shall be collected by means of stamps in the manner prescribed by the Public Offices Fees Act, 1879, and any amending Act, and in accordance with any regulations or orders made from time to time by the Treasury, by virtue of the powers conferred on them by the said Act or Acts; and the officers above named shall, each in his own department, be responsible for the observance of these regulations, and the collection of all fees specified in the tables, and the due cancellation of the stamps.

3. Fees not Payable by Officers of the Crown.

No fees shall be payable on extracts or copies required by any officer of the Crown on behalf of the public service, nor shall any officer of the Crown pay fees on any note or report or incidental application which he may have to present to the Court in the course of his duty as an officer of the Crown.

4. Parties Suing in forma pauperis.

Parties who have been allowed to sue or defend in *formâ pauperis* shall be exempted from the payment of the fees in the first instance.

5. Consistorial Causes.

In any consistorial cause, depending in the Court of Session, in which fees have been paid by both or either of the parties, it shall be competent for the Lord Ordinary, or the Court, on cause shown, to remit the whole or any portion of such fees, and to order the same to be repaid to both or either of the litigants; and the King's and Lord Treasurer's Remembrancer for Scotland, on receiving due intimation of such order of remission and repayment from the clerk to the process, along with a note duly certified by him of the nature and amount of the fees so ordered to be remitted and repaid, shall forthwith issue a certificate to the Inland Revenue, in order that the amount paid may be refunded to such party or parties or to their known agents in Edinburgh.

6. Modification or Remission of Fees in Accountant of Court's Department.

It shall be competent for the factor, tutor, curator, trustee, or other official in charge of any estate under the supervision of the Accountant, or for any person beneficially interested therein, to apply by manuscript note, presented to the Lord Ordinary officiating on the Bills, whether in session or vacation, praying that any of the fees exigible under Part XIII. of the annexed table shall be modified, or entirely remitted, in respect of the poverty of the estate, or other exceptional circumstances; and the Lord Ordinary, after obtaining a Report from the Accountant thereon, shall dispose of the application as may be just, and his decision shall be final; and in the event of any modification or remission being granted, the same shall be intimated, by the Clerk of the Bills, to the King's and Lord Treasurer's Remembrancer.

7. In this Act and relative Table the following words shall have the meanings undermentioned:—

"Party," except in "Special Cases," shall include a set of persons with the same interest, for whom one and the same first paper is or has been lodged. In "Special Cases" "Party" shall mean a person or persons who appear as one of the separate parties to the case.

"Step" shall mean a step of process.

8. The fees for Proof, Deposition of Party on Reference, Hearing, and Jury Trial shall, in the first instance, be payable in equal shares by the parties to the action when there are more than one. Any fraction of sixpence which occurs in the division between the parties shall be charged as sixpence payable by each party.

The Clerk of Court shall note the duration of the Proof, Deposition, Hearing, or Jury Trial, on a Minute of Proceedings, and shall, within one week of the date of the interlocutor or verdict pronounced on the Proof, Deposition, Hearing, or Jury Trial, collect the Fee Fund Stamps payable in respect thereof, and these stamps shall be affixed to the margin of the Minute. The Minute of Proceedings shall be a step in the process and shall only be borrowable for transmission to the Auditor.

9. Fee Fund Account Books.

The books of account to be kept by the officers of Court other than the Accountant of Court, in each office in which the fees are payable, shall be in the form of the Schedule hereto annexed,

J. A. CLYDE, *I.P.D.*

TABLE OF FEES PAYABLE IN THE COURT OF SESSION AND OFFICES CONNECTED THEREWITH.

I.—Inner House.

1.	Original petitions, petitions and complaints, appeals, or any other writ or step by which a cause or proceeding is originated,	£2	0 0
2.	Special Cases—		
	(*a*) Where two parties only,	3	0 0
	(*b*) Each additional party,	1	0 0
	Subject to a maximum of £5 per case.		
3.	Answers or other step by which a party first makes appearance in a petition, cause, or proceeding,	1	0 0
4.	Petitions and answers not being first steps,	0	10 0
5.	Minutes or notes and answers thereto,	0	5 0
6.	Objections and answers thereto,	0	5 0
7.	Reports by Accountants, men of business, or other persons of skill, under remits by the Court,	0	10 0
8.	Reports by judicial referees,	0	10 0
9.	Specifications of Documents called for, whether separate or appended to note for commission and diligence,	0	5 0
10.	Certified copy interlocutor, each copy,	0	5 0
11.	(*a*) Proof, including hearing thereafter, per hour, or part thereof,	0	10 0
	(*b*) Report of Commission,	0	5 0
12.	Deposition of party on reference, the same fee as for proof, viz., per hour, or part thereof,	0	10 0
13.	Hearing—For all discussions other than in single Bills, per hour, or part thereof,	0	5 0
14.	Interrogatories,	0	10 0
15.	Cross Interrogatories,	0	10 0
16.	Notes to Lord President,	0	5 0
17.	Reclaiming notes with or without appendices,	0	15 0
18.	Appendices to reclaiming notes or other papers when lodged separately,	0	5 0
19.	Copies of pleadings when certified by Clerk of Court,	0	5 0
20.	Inventories of productions, including documents produced during or put in evidence at close of proof or jury trial—		
	(*a*) First Inventory,	0	5 0
	(*b*) Each further inventory, for each 100 documents or part of 100 documents included therein,	0	5 0
	Note.—All productions made by witnesses during the course of a proof or trial shall be detailed in an inventory prepared by the agent of the party in whose interest they are lodged, and fees shall be paid thereon according to the number of such productions.		
21.	Bonds of judicial caution on being lodged,	0	10 0
22.	Certified copy of proceedings for appeal to the House of Lords,	2	0 0

23. Captions—
Marking caption when ordered, £0 5 0
Warrant for caption when issued, 0 5 0
24. Jury causes—
(1) Adjusted issues, 0 5 0
(2) Notices of motion for new trial, 0 15 0
(3) Citation of each jury, to include outlays of sheriff clerk in citing and countermanding, 2 0 0
NOTE.—The fee stamps to be affixed to precept before transmission to the Sheriff. The precept to be issued not later than ten days previous to date fixed for trial.
(4) Bill of exceptions, 0 15 0
(5) For time occupied by trial of the cause up to commencement of the judge's charge, per hour, or part thereof, 0 10 0
(6) Report of Commission, 0 5 0
25. Brieve of cognition or precept following on any other initial writ in any proceedings before the Lord President, 1 0 0
NOTE.—Other steps will bear the same fees as in ordinary actions and jury causes.
26. Letters of request to foreign Courts, 0 10 0
27. Note for warrant to cite witnesses furth of Scotland, 0 5 0
28. Every other step or pleading in the Inner House not enumerated in this schedule, 0 10 0

II.—Outer House.

1. Summonses, petitions, appeals, or any other writ or step by which a cause or proceeding is originated, 1 0 0
2. Defences, answers, or other writ by which a party first makes appearance in a cause, 1 0 0
3. Note of suspension on transmission to Outer House, 0 10 0
4. Closing record, each party, 0 10 0
5. Inventories to satisfy production, 0 5 0
6. Petitions and notes not being first steps of process, 0 5 0
7. Minutes or other incidental steps and answers thereto, 0 5 0
8. Objections and answers thereto, 0 5 0
9. Reports by accountants, men of business, or other persons of skill, under remits by a Lord Ordinary, 0 10 0
10. Reports by judicial referees, 0 10 0
11. Specifications of documents called for, 0 5 0
12. Certified copy interlocutor, each copy, 0 5 0
13. (*a*) Proof, including hearing thereafter, per hour, or part thereof, 0 10 0
(*b*) Report of commission, 0 5 0
14. Deposition of party on reference, the same fee as for proof, viz., per hour or part thereof, 0 10 0
15. Hearing.—For all discussions other than in the Motion Roll, per hour or part thereof, 0 5 0
16. Interrogatories, 0 10 0
17. Cross interrogatories, 0 10 0
18. Condescendences and claims or interests, and revised condescendences and claims or interests in multiplepoindings, rankings, etc., for each separate claim where the sum claimed is upwards of £25, 0 5 0
19. Copies of pleadings certified by Clerk of Court, 0 5 0
20. Inventories of productions, including documents produced during, or put in evidence at close of proof or jury trial—
(*a*) First Inventory, 0 5 0
(*b*) Each further Inventory, for each 100 documents or part of 100 documents included therein, 0 5 0
NOTE—All productions made by witnesses during the course of a proof or trial shall be detailed in an inventory prepared by the agent of the party in whose interest they are lodged, and fees shall be paid thereon according to the number of such productions.
21. Bonds of judicial caution on being lodged, 0 10 0
22. Captions—
Marking caption when ordered, 0 5 0
Warrant for caption when issued, 0 5 0
23. Jury causes—
(1) Adjusted issues, 0 5 0
(2) Citation of each jury, to include outlays of Sheriff Clerk in citing and countermanding, 2 0 0
NOTE—The fee stamps to be affixed to precept before transmission to the Sheriff. The precept to be issued not later than ten days previous to date fixed for trial.
(3) For time occupied by trial of the cause up to commencement of the judge's charge, per hour, or part thereof, 0 10 0
24. Letters of request to foreign Courts, 0 10 0
25. Note for warrant to cite witnesses furth of Scotland, 0 5 0
26. Every other step or pleading in the Outer House not here enumerated, 0 10 0

III.—Exchequer Causes.

1. Subpœna under the Exchequer (Scotland) Act, 1856, 0 5 0
2. Appraisement of seizure under do., do., 0 7 6
3. Information under do., do., 0 7 6
4. Claim of seizure under do., do., 0 10 0
5. Petition for summary decree for Crown debts or rents, 0 10 0
6. Petition to uplift Parliamentary deposits, 0 10 0
7. Cases stated uuder the Taxes Management Act, 1880, 0 10 0
8. Cases stated by Quarter Sessions for the opinion and judgment of the Court, 0 10 0
9. Case stated under Stamp Act, 1891, sec. 13, 0 10 0
10. Special Case under Court of Exchequer Act, 1856 (following subpœna and information), 0 5 0
(Any other writ or step of procedure the same fees as similar writs or steps under Nos. I and II.)

IV—Bill Chamber.

1.	Petitions for sequestration,	£1 0 0
2.	Answers or objections to No. 1,	0 10 0
3.	Certified copies of petitions for sequestration and relative interlocutors, each,	0 10 0
4.	Appeals in sequestrations, condescendences therein, minutes or notes to award sequestration or to dismiss petitions for sequestration, and other applications in or connected with sequestrations,	0 5 0
5.	Answers or objections to No. 4,	0 5 0
6.	Every extract or certified copy of proceedings in or connected with sequestrations other than certified copies under No. 2, per sheet of writing or part thereof,	0 2 0
7.	Petitions and notes before the Junior Lord Ordinary, being first steps of process, and answers thereto,	1 0 0
8.	Petitions and notes before the Junior Lord Ordinary, not being first steps of process, and answers thereto,	0 5 0
9.	Reports by accountants, men of business, or other persons of skill under remits by the Court,	0 10 0
10.	Minutes or other incidental steps and answers thereto,	0 5 0
11.	Notes of suspension, suspension and interdict, or suspension and liberation, and answers thereto,	0 10 0
12.	Caveats when lodged or renewed,	0 2 6
13.	Fiats,	0 5 0
14.	Bills for loosing arrestments or inhibitions, and answers thereto,	0 5 0
15.	Valuation appeals (railways and canals),	1 0 0
16.	Maritime concurrences, with warrants to dismantle,	0 5 0
17.	Registering office copies of orders of English and Irish Courts,	0 10 0
18.	And, in addition, for each sheet of writing bey nd four sheets,	0 2 6
19.	Authentication by judge of act and warrant, in terms of sec. 70 of the Bankruptcy (Scotland) Act, 1913,	0 5 0
20.	In proofs taken before Bill Chamber judge—	
	(*a*) Proof, including hearing thereafter, per hour, or part thereof,	0 10 0
	(*b*) Report of commission,	0 5 0
21.	Deposition of party on reference, the same fee as for proof, viz., per hour, or part thereof,	0 10 0
22.	Hearing—For all discussions other than in the Motion Roll, per hour, or part thereof,	0 5 0
23.	Specification of documents called for,	0 5 0
24.	Interrogatories,	0 10 0
25.	Cross interrogatories,	0 10 0
26.	Certified copy interlocutors, each,	0 5 0
27.	Copies of proceedings other than those above specified certified by Clerk of Court,	0 5 0
	NOTE This and preceding fee cover all charges for writing.	
28.	Inventory of productions, including documents produced during, or put in evidence at close of proof—	
	(*a*) First inventory,	0 5 0
	(*b*) Each further inventory, for each 100 documents or part of 100 documents included therein,	0 5 0
	NOTE.—All productions made by witnesses during the course of a proof shall be detailed in an inventory prepared by the agent of the party in whose interest they are lodged, and fees shall be paid thereon according to the number of such productions.	
29.	Bonds of caution,	0 10 0
30.	Extracts of decrees, and of bonds of caution,	0 10 0
31.	And in addition for each sheet of writing beyond four sheets,	0 2 6
32.	Certified copy of proceedings for appeal to the House of Lords,	2 0 0
33.	Captions—	
	Marking caption when ordered,	0 5 0
	Warrant for caption when issued,	0 5 0
34.	Note for warrant to cite witnesses furth of Scotland,	0 5 0
35.	Every step or pleading not specified above,	0 5 0

V.—Court of Teinds.

1.	Summons or other writ or step by which a cause or proceeding is originated,	1 0 0
2.	Defences or other step or writ by which a party first makes appearance in any cause or proceeding,	1 0 0
3.	Original petition,	1 0 0
4.	Answers to original petition,	1 0 0
5.	Objections and answers,	0 5 0
6.	Minutes or notes and answers thereto,	0 5 0
7.	Specifications of documents called for, whether separate or appended to note for commission and diligence,	0 5 0
8.	Closing record, each party,	0 10 0
9.	Certified copy interlocutors, each,	0 5 0
10.	In proofs taken before Lord Ordinary in teind causes—	
	(*a*) Proof, including hearing thereafter, per hour, or part thereof,	0 10 0
	(*b*) Report of commission,	0 5 0
11.	Deposition of party on reference, the same fee as for proof, viz., per hour, or part thereof,	0 10 0
12.	Hearing—For all discussions other than in the Motion Roll, per hour, or part thereof,	0 5 0
13.	Reports by accountants, men of business, or persons of skill, under remits by the Court,	0 10 0
14.	Inventories of titles,	0 5 0
15.	Minutes of election of common agent,	0 2 6
16.	State of teinds,	0 10 0
17.	Copies of pleadings certified by clerk,	0 5 0
18.	Inventory of productions, including documents produced during, or put in evidence at close of proof—	
	(*a*) First inventory,	0 5 0
	(*b*) Each further inventory, for each 100 documents or part of 100 documents included therein,	0 5 0
	NOTE.—All productions made by witnesses during the course of a proof shall be detailed in an inventory prepared by the agent of the party in whose interest	

they are lodged, and fees shall be paid thereon according to the number of such productions.

19. Captions—
Marking caption when ordered, £0 5 0
Warrant for caption when issued, 0 5 0
20. Reclaiming notes with or without appendices, 0 15 0
21. Appendices to reclaiming notes or other papers when lodged separately, 0 5 0
22. Searches in teind records for extracted processes, 0 5 0
23. Reports in cases of erection *quoad sacra* where titles are examined and draft deeds are revised, 10 10 0
24. Reports in glebe cases in transportations of churches and manses *quoad sacra*, and in applications for change of security in *quoad sacra* cases, 3 3 0
25. Framing localities, interim and final—
For first ten calculations, 1 1 0
For each calculation thereafter, 0 1 0
In addition for each sheet of writing, 0 1 0
26. Apportionment of expenses among heritors—
(Same charge as for framing localities).
27. Amending localities or making alterations under order from the Court—
(Same charge as for framing localities).
28. Scheme of proven rental, 1 1 0
29. Copy locality, small folio, per sheet, figs., 0 5 0
Copy locality, large folio, 0 6 0
30. Certifying copy production, *e.g.*, form of feu-charter, 0 10 0
31. Searching old register and examining decree, 0 5 0
32. Searching augmentation register and examining books other than extracts, 0 2 6
33. Making (and converting from Imperial to Standard) statutory list of fiars' prices and certifying same, *vide* Act, 1808. For each kind of grain, 0 2 6
34. Extract and record copy of ordinary copying, per sheet, 0 2 0
35. Certifying copy locality, one sheet, 0 2 6
If longer, 0 5 0
36. Extract decrees of locality, 2 0 0
37. Extract decrees of valuation, 2 0 0
38. Extract of any other decree in absence, 1 0 0
Extract of any other decree *in foro*, 1 10 0
39. Notes for searches—
If under ten years from the date of the order, each search, 0 2 6
Ten years and under twenty-five, 0 7 6
Twenty-five years and upwards, 0 12 6
40. Note for warrant to cite witnesses furth of Scotland, 0 5 0
41. Every other step or pleading not here enumerated, 0 10 0

VI.—Registration Appeal Court
AND
VII.—Valuation Appeal Court.

1. Cases on appeal, 1 0 0
2. Hearing—For all discussions other than in Single Bills, per hour, or part thereof, 0 5 0

VIII.—Court of Trial of Election Petitions.

1. Petitions against return of Members of Parliament, 1 0 0
2. Statement of particulars, 0 10 0
3. Any other petitions, applications, answers, or objections submitted to the judges, 0 10 0
4. Notice of application for leave to withdraw petition, 0 10 0
5. Certificate of judgment, 0 15 0
(Any other writ or step of procedure, the same fees as similar or analogous writs or steps under Nos. I. and II.)

IX.—Taxation of Expenses.

For taxing accounts of expenses incurred in judicial proceedings remitted to the auditor for taxation:—
Under £50, 0 10 0
For every additional sum of £50, or part of £50, 0 10 0
NOTE.—These fees to be collected by Clerks of Court.

X.—Extracts.

1. Extract of decree in absence—
(*a*) Pronounced on consideration of summons or petition, without any prior remit, or proof, or other procedure, 1 0 0
(*b*) Pronounced in proceedings under Entail Acts, or in liquidations under Companies Acts, or in application for power to complete titles, or borrow money, or sell heritable or moveable estate, or to exercise other special powers, 1 10 0
2. Extract of decree *in foro*, 1 10 0
NOTE.—The above fees are payable only on the first extract issued. When decree is extracted in duplicate, triplicate, etc., only copying fees under No. 6 of this part of the Table of Fees shall be charged.
3. Extract of admission as a law agent, 0 10 6
4. Extract of protestation, 0 10 6
5. Certificate under Judgments Extension Act, 0 5 0
6. Engrossment of extract, record copy, and certificate, each, per sheet of 250 words, 0 2 0
Figured work 1s. extra per sheet.

XI.—Signet Office.

1. To signet any writ—
(*a*) Presented during office hours, viz., from 3 to 4 daily, except Saturday, on which day, from 11 to 12, the office being shut on public holidays, 0 5 0
(*b*) Presented out of office hours, viz., on Monday, Tuesday, Wednesday, Thursday and Friday, even though holidays—
From 10 a.m. to 3 p.m., 0 10 0
From 7 p.m. to 8 p.m., 0 15 0

On Saturday, even though holiday—

From 10 a.m. to 11 a.m.,	£0	10	0
From 2 p.m. to 3 p.m.,	0	15	0

(NOTE.—The above fees are prescribed by the Court, but the extra hours, during which the officers of the Signet are allowed to Signet any writ, are fixed, and may be varied at any time by the Keeper of the Signet. In the event of such variation, the fees charged shall be as herein prescribed for hours before and after the ordinary office hour respectively.)

APPRENTICES—

2. Fee for petition, including recording indenture,	3	0	0

INTRANTS—

3. Recording discharge of indenture and petition to pass,	2	0	0
4. Commission,	50	0	0
5. For each incidental petition,	1	0	0

XII. Edictal Citations.

1. For access to and liberty to make excerpts or copies of writs, etc., from any record, for each year of record inspected,	0	1	0
2. For extracts or copies, per sheet of 250 words,	0	2	0

XIII.—Accountant of Court's Department.

A. IN FACTORIES, CURATORIES AND PRIVATE TRUSTS.

1. For receiving, examining, recording, and delivering up bonds of caution,	0	10	6
2. On lodging inventory, and adjusting same, when the estate			
(*a*) Exceeds £100, but does not exceed £500,	0	10	0
(*b*) Exceeds £500, but does not exceed £1000,	1	0	0
(*c*) Exceeds £1000, for the first £1000,	1	0	0
and for each £1000, or part of £1000 thereafter, but not to exceed £10 10s.	0	10	0
3. For each search of the records of subsisting, exhausted, or of new factories, or for any information therein contained,	0	5	0
4. For auditing each account			
(*a*) Where factor's commission is under £1 1s.,	0	2	6
(*b*) Where factor's commission is under £2 2s.,	0	5	0
(*c*) Where factor's commission is £2 2s. and upwards, and in the last named case, *i.e.* (*c*), an additional 12½ per cent. on the factor's commission as allowed (or what would have been the factor's full commission if chargeable or fully allowed).	0	10	6
5. For discharges, reports on application for special powers or other special reports,	0	10	6
to	10	10	0
6. For reports on schemes of division, and 10s. 6d. extra for each £1000, or part thereof, divided.	1	1	0
7. For certificates for the Bank of England under section 66 of the Finance Act, 1916,	0	5	0

B. IN BANKRUPTCIES.

8. On lodging copy Act and warrant,	0	10	6
9. For supervising proceedings, examining and issuing acknowledgment of Sederunt Book, and reporting on trustees discharge, 1 per cent. on amount divided amongst ordinary creditors, but only when total amount for division is over £100,			
10. For report on bankrupt's petition for discharge,	1	1	0
11. For concurrence in private sales, if £1000 or under, and 10s. 6d. extra for each additional £1000, or part thereof.	1	1	0
12. For special reports,	1	1	0
13. For reports regarding trustees' commission, and 2 per cent. on the trustees' commission as fixed, but not to exceed £10 10s.	0	10	6
14. For each inspection of Sederunt book or search of the records of subsisting, exhausted, or new sequestrations, or for any information therein contained,	0	5	0
15. For auditing the accounts and fixing the commission of trustees under voluntary trust deeds, 10 per cent. on commission allowed to trustee.			

C. IN CESSIOS.

16. For report on bankrupt's petition for discharge,	0	10	6

D. IN CONSIGNATIONS.

17. For lodging consignations,	0	2	6
18. For producing or delivering up, and 1s. for every £100 uplifted, but not to exceed £2 2s.	0	2	6
19. For examining registers,	0	2	0
20. For certified copies, each page,	0	2	6

XIV.—Books of Council and Session.

1. Registration of Deeds and Certificates of English and Irish Judgments—			
(*a*) Preservation of Deeds, each,	0	2	0
(*b*) Recording, per sheet,	0	2	0

Figured work, 1s. per sheet extra.
Display work, 1s. per sheet extra.
Ancient, Foreign, or Difficult Script, 10s. per hour extra.

(*c*) Extracting—same rates as recording.

NOTE.—Each deed presented shall be charged the fees for preservation, recording, and extracting, but second and subsequent extracts shall be charged only the fees for extracting. Where five or more extracts are ordered at the same time, they may be duplicated in print at the expense of the applicant according to the rates charged by H.M. Stationery Office, in which case the extracting fee shall only be charged on the first of these printed extracts, and each other separate printed extract shall be charged a certification fee of 5s.

2. Recording protest of a bill or promissory note,	0	5	0
3. Production and inspection of indexes, record volumes, and original warrants			
(*a*) For inspection of indexes, each year,	0	1	6
(*b*) For inspection of record volumes, each volume,	0	2	6
(*c*) For inspection of original warrants, each warrant,	0	2	6

(*d*) For inspection of an instrument of protest,	£0	2	6
(*e*) For excerpts or copies made from any volume or document by the searcher for each 400 words or parts thereof,	0	1	0
(*f*) For production of any record volume, or original warrant in pursuance of the Acts and Orders of the Lords of Council and Session,	1	1	0
4. Issue of certificate of judgment for transmission to the Supreme Courts of England, Ireland, the Dominions, and Protectorates,	0	5	0
5. Issue of a certificate that a deed is retained for preservation,	0	5	0

SCHEDULE.

Date.	Cause.	Writ.	Section of Table under which Fee Charged.	Amount.

Appointments, Business Changes, &c.

The Hon. William Watson, K.C., has been appointed Solicitor-General for Scotland in place of Mr. Constable, K.C., now a Judge of the Court of Session. In consequence of this appointment the Lord-Advocate has appointed the Right Hon. Lord Kinross, hitherto Extra Advocate-Depute on the Glasgow Circuit, to be Advocate-Depute. Mr. Alexander Maitland, at present Advocate-Depute for the Sheriff Court, replaces Lord Kinross on the Glasgow Circuit, and Mr. J. M. Hunter succeeds Mr. Maitland as Advocate-Depute for the Sheriff Court. Mr. Hunter thus vacates the position of Junior Counsel in Scotland for the Board of Trade, and Mr. H. Burn Murdoch is appointed to fill this vacancy.

Midlothian.—Mr. Walter J. Lewis, S.S.C., Edinburgh, has been appointed Auditor of the Sheriff Court of Midlothian, in room of Mr. Thomas M. Mackay, S.S.C., resigned.

Edinburgh.—Mr. Robert Candlish Henderson, K.C., has been appointed Professor of Scots Law in the University of Edinburgh, in succession to Sir John Rankine, K.C., LL.D.

The following gentlemen have been admitted to the Faculty of Advocates:—Mr. Thomas Innes, Mr. Archibald Edward Considine, B.A.(Oxford); Mr. James Gordon M'Intyre, B.A.(Oxford), LL.B.(Glasgow); and Mr. George Reid Thomson, B.A.(Oxford), LL.B.(Edinburgh).

Mr. James Fleming Baird Wallace has been admitted a member of the Society of Solicitors in the Supreme Courts.

The firms of Messrs. Guild & Shepherd, W.S., and Messrs. Carment, Wedderburn & Watson, W.S., have combined and will carry on business under the firm-name of Shepherd & Wedderburn at 16 Charlotte Square.

Aberdeen.—Mr. Eric W. H. Brander, of Messrs. Brander & Cruickshank, has been admitted a member of the Society of Advocates in Aberdeen.

Elgin.—The firms of Cockburn & Young and Hamilton & Reid,

solicitors, Elgin, have amalgamated under the firm-name of Cockburn, Hamilton & Young. The partners are Mr. Alexander Cockburn, town-clerk, Mr. James Russell Hamilton, solicitor, and Mr. James Young.

Law Agents' Examinations.—The half-yearly examinations in general knowledge conducted by the examiners of law agents were held in Edinburgh and Glasgow on 11th, 12th, 13th, and 14th July, and the results have now been intimated to the candidates. For the first examination in general knowledge, which qualifies for apprenticeship, 60 applicants presented themselves. Twenty-two of these have passed or been found qualified in all the subjects, and 19 have passed or been found qualified in two subjects. For the second examination in general knowledge 80 candidates entered. Two of these passed in three subjects, 22 in two, and 29 in one subject. The papers of the candidates in this examination were as follows:—Mathematics 21, passed 12; Logic 28, passed 14; Latin 28, passed 19; Greek 1, passed 1; French 28, passed 14; German 2, passed 2; Book-keeping 44, passed 17. Since the examinations held in January last 33 candidates have received certificates of exemption from the first examination in general knowledge in respect of holding intermediate certificates of the Scottish Education Department or other substitute certificates. At the quarterly examination in law, which was held in Edinburgh last month, 44 candidates presented themselves for examination. Thirty-three of these were examined in all the subjects, and 24 passed, and 11 graduates in law holding the degree of LL.B. or B.L. of the Scottish Universities were examined in Court procedure, and all passed.

The following candidates have passed the examination in law which was held in Edinburgh on 17th, 18th, 19th, and 20th July, viz.:—Robert Blackburn Allan, Johnstone; Hubert Walter Banks, B.L., Edinburgh; John Alexander Beaton, Edinburgh; Thomas Buick, Broughty Ferry; Hugh James Carlton, M.A., LL.B., Edinburgh; George Coghill, M.A., LL.B., Glasgow; Alexander Robertson Cross, B.A., LL.B., Glasgow; George Davie, B.L., Bridge of Earn; Robert Dick, Hamilton; Thomas Peace Drever, Edinburgh; Alexander Fletcher, M.A., LL.B., Glasgow; Mackenzie Fortune, Edinburgh; Hugh Gallacher, Hamilton; John Glassford Gardiner, Glasgow; John Falconer Gillan, Buckie; William Douglas Gillespie, B.L., Castle Douglas; Frederick Gordon, Peterhead; George Geddes M'Gregor, Perth; Kenneth M'Intosh, B.L., Glasgow; Edward M'Laughlin, Glasgow; George Blain M'Murtrie, Edinburgh; William Robert Duguid M'Naughton, Buckie; Charles Mactaggart, Campbeltown; John Meek, Glasgow; George Cant Mitchell, Musselburgh; William Patrick Mitchell, B.L., Glasgow; Robert Paterson, Edinburgh; William M'Nee Paterson, Glasgow; James Ross, Hamilton; William Cumming Simpson, Edinburgh; David Smith, Edinburgh; James Reid Smith, Glasgow; James Douglas Tait, B.L. Glasgow; James Sutherland Tait, Edinburgh; Neil Watson, M.A., LL.B., Edinburgh.

Incorporated Society of Law Agents in Scotland.—A meeting of the council was held in Edinburgh on 20th July, Mr. Patrick Cooper, advocate, Aberdeen, the president, in the chair.

Annual Meeting.—An invitation from the Faculty of Procurators of Greenock to the society to hold its next annual meeting at Greenock was submitted, and was unanimously accepted. The council resolved that the meeting should be hold on Friday, 6th October.

Unqualified Persons.—The convener of the committee appointed to consider the subject of unqualified persons doing law agents' work, and of law agents sharing fees with unqualified persons, stated that a draft report was being considered by the committee, and the remit was continued. Attention was drawn to the terms of sec. 60 of the Finance Act, 1921, which conferred power on the Law Society of England to institute proceedings there under sec. 44 of the Stamp Act, 1891, and it was stated that the Law Society had conducted prosecutions successfully in a number of cases.

Poors Agency.—The vice-president reported from the committee of council on poors agency as to steps being taken with the view of obtaining some remuneration for poors agents. The matter was left in the hands of the committee, with instructions to continue their negotiations and to report.

Co-operation among Law Societies.—The council was informed that a meeting of representatives of the Society of Writers to the Signet, the Society of S.S.C., the Faculty of Procurators in Glasgow, and this society was to be held on 21st July curt., to consider the proposal of this society for the formation of a standing joint committee of the societies named, and of such others as they might invite to join them. Representatives were appointed by the council to attend the joint meeting on behalf of this society.

Agricultural Holdings (Scotland) Bill.—A report on this bill was submitted by the Bills Committee, and the secretary was instructed to draw the attention of the Lord Advocate and the Secretary for Scotland to the terms of sub-clause (6) (*a*) and (*b*) of clause 12, and to request that the deductions to be allowed should be specifically stated, and should not bear reference to deductions allowed in England, which would involve an inquiry in each case as to what public burdens were payable by occupiers of lands in England and were not chargeable on the lands there. The council were strongly of opinion that such a clause would form a bad precedent, and was anomalous in an Act of Parliament whose scope was confined to Scotland.

Commission on Government Issues.—The Secretary submitted copy of a letter from the Secretary to the Treasury to the Law Society, stating that the Lords Commissioners considered that they could not extend the range of commission payments in respect of Government loans, and that no good purpose would be served by their receiving a deputation. The council expressed disappointment with the opinion of the Treasury, and postponed the consideration of further action until they ascertained the views of the other legal societies.

Amendment of the Law of Diligence.—It was stated that there had been no further development following on the presentation of the memorial to the Secretary for Scotland.

Service of English Writs out of Jurisdiction.—The president reported with regard to the desired exclusion of Scotsmen from the operation of the English rule with regard to service out of the jurisdiction of actions arising on tort, that the Lord Advocate had the matter in hand with the Lord Chancellor's secretary, and that it was understood that the Rules Committee would take the desired action.

Membership.—One hundred solicitors were unanimously elected members of the Society.

THE

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LIABILITY OF AUTOMOBILE OWNER WHEN CAR DRIVEN BY MEMBER OF HIS FAMILY.

IT is a familiar principle of law that a master is liable for the negligence of his servant. It is also an established principle that a parent is not liable for a wrong committed by his child.

In the United States Courts they seem to have considerable difficulty in driving accident cases in reconciling these two principles. To get over this they appear to have evolved what is termed the family automobile doctrine, under which it has been held that, where a person allows a member of his family to drive an automobile which he maintains for the comfort, convenience, entertainment, or recreation of his family, and the driver negligently injures the property of a third party, the owner is liable.

The point of difficulty is that the head of the family who has bought and owns the car may be away at business, and while he is thus absent a son or daughter may take the car for a run and damage somebody. Who is liable? The person who actually committed the wrong is certainly liable, but in the case of a daughter, for instance, nothing might be recoverable against her. Is her father liable? Mere ownership by him of the car does not create liability; he may even have given instructions not to take out the car; his son or daughter is not his servant in any sense of the term; if he had a regular servant on the premises, and such servant took out the car, then, such servant being ostensibly within the scope of his employment, the owner is liable for any wrong done by the servant; but again we come to the point, is he liable for a wrong done by a son or daughter when driving his car?

It is to meet this position that the American Courts have set up the doctrine of common purpose, the common purpose being that, as the car is kept for the general use, convenience,

and recreation of the household, any of the household driving it is acting in furtherance of its owner's purpose, and thus is acting on account of the owner in that purpose. Therefore, if a daughter, for instance, is using the car for the entertainment of her own particular friends, that is a common household purpose, and if she runs down somebody while so using the car, her father is liable. This is presumably an extension of the doctrine of implied agency.

The most recent case is that of *Jones* v. *Cook*, 11th April, 1922, Supreme Court of Appeals of West Virginia, in which the authorities are reviewed and a considerable conflict of opinion disclosed. In that particular case the Court by a majority held the owner of the car liable for a wrong committed while it was being driven by his step-daughter. The following passage is typical of the opinion of the majority of the Court:—

"If the father makes it his business or affair to furnish "members of his family with an automobile for family use, "and he maintains it for that purpose, just the same as it "is his business to furnish them with food and clothing or to "minister to their health in other ways, then he is in the "furtherance of that business just as surely when a single "member of the family is driving it for his own pleasure "and convenience as if all the family were riding in it. "Counsel for defendant say that defendant is not liable for "the negligence of the step-daughter in the operation of the "automobile in the present case, because it was none of his "affair; but we hold that he made it his affair by maintaining "the automobile for the very purpose for which she was "using it at the time of the injury. He owned the machine, "and had the right to say where, how, and by whom it might "be used, and impliedly, if not expressly, authorised the use "to which it was put when the accident occurred. The "doctrine of agency is not confined to merely commercial "business transactions, but extends to cases where the father "maintains an automobile for family use, with a general "authority, expressed or implied, that it may be used for "the comfort, convenience, pleasure, and entertainment, or "outdoor recreation of members of the owner's family."

On the other hand, the dissenting judge very tersely states the opposing principle as follows:—

"In agency, one person must be doing something for "another, not merely for himself. The same principle "governs in master and servant. If the owner of the car "has a purpose in allowing a member of his family to use it

" for his own purposes, the purpose of the former is neces-
" sarily merged in that of the latter. It is merely subordinate
" when the two purposes coincide. One must be dominant,
" and when the car is running the dominant one is that of the
" driver. The car serves his purpose merely with the consent
" of the owner, just as much as if it had been loaned or hired
" to any stranger."

The question is bound to come up in our Courts sooner or later. In fact, it is surprising that it has not already emerged. We are inclined to think that when it does come up for discussion there will be a strong presumption that a son or daughter driving a motor car is the agent, virtually the servant, of their father, and the evidence will need to be very clear that they were acting entirely on their own. It may be doubted, however, whether our Courts will go the length of setting up the doctrine of common purpose, as has been done in the American case cited.

COURT OF SESSION DUES.

Commencing on 1st October next, there will be exigible the dues imposed on Court of Session writs by the Act of Sederunt dated 20th July, 1922, and as the amounts now to be paid will in most instances mean a 100 per cent. increase on the dues fixed by Act of Sederunt in 1896, there is a feeling among Edinburgh agents that, instead of more money being collected for the Exchequer than formerly was the case by means of Court dues, the reverse will be the experience, having regard to the hesitation of clients to embark on litigation in the Supreme Courts owing to expense and delay in obtaining final judgments. Just now money is scarce enough for the conduct of business concerns, and to face up to a law-suit in the guise of a pursuer is a serious matter for a man to contemplate, especially when it is suspected that to litigate is merely throwing good money after bad. There are still a few actions which only the Court of Session can touch, such as divorces, declarators, and reductions, and people who have only that Court available cannot, of course, help themselves, and the higher imposts must be met by them. But there are a great many others who, being located in districts possessed of Sheriffs-Substitute and Sheriffs who have earned the confidence of the inhabitants, will be disposed to rest satisfied with Sheriff Court judgments in the actions there competent, which, in addition to being obtained with celerity, are also economical as regards Court dues, printing, and pleaders' fees. It will be surprising if the extra income

anticipated by the raising of Court of Session dues will be realised, though a substantial increase in the Sheriff Court drawings may be looked for.

As showing what a pursuer must now be prepared to face in financing his agents by way of disbursements which must be paid, apart from legal charges, counsel's fees, and printing, the following list of fee-fund dues exigible formerly and as from 1st October will illustrate the handsome manner in which the members of Lord Blackburn's Committee have seen fit to deal with the modern litigant's burden. An ordinary petitory action, starting in the Outer House, going to proof, and thereafter going to the Inner House, is given as example:—

	Former dues.	New dues.
Signeting summons, ...	£0 2 6	£0 5 0
Calling summons, ...	0 10 0	1 0 0
Inventory of productions (first one),	—	0 5 0
Closing record, ...	—	0 10 0
Specification of documents, ...	0 2 6	0 5 0
Certified copy interlocutor for Commissioner, ...	0 2 6	0 5 0
Do. to cite witnesses, ...	0 2 6	0 5 0
Report of commission (1 witness), (The new charge, however, covers any number of witnesses).	0 1 0	0 5 0
Inventory of recoveries (over 40 and under 100), ...	0 5 0	0 5 0
Proof—Pursuer's proportion for his witnesses (say, 5 in number, occupying 3 hours), ...	0 12 6	1 10 0
Hearing on evidence (Pursuer's proportion, say, 1 hour), ...	—	0 10 0
(*Note.*—The proof and hearing are now charged for a continuous sederunt at 10s. per hour, each party being liable in one-half.)		
Inventory of documents put in evidence, ...	0 2 6	0 5 0
Reclaiming note, ...	0 10 0	0 15 0
Appendix separate, ...	0 2 6	0 5 0
Hearing (Reclaimer's half, say, for a 4-hours' debate), ...	—	0 10 0
Account of expenses (say, £150), ...	2 0 0	1 10 0
Extract dues, ...	1 12 0	2 6 0
	£6 5 6	£10 16 0

In the new table of dues a novelty has been introduced in the way of charging for witnesses in the inclusive charge for proof and hearing on evidence, according to the time occupied. Formerly witnesses were charged for in proofs and jury trials at the flat rate of 2s. 6d. each, no matter how long any par-

ticular witness might be in the box—it might be several days—and a time charge seems fair enough for the majority of cases. It will have, or ought to have, the desirable result of curtailing the leading of superfluous evidence and the reiterated extraction of answers already given by witnesses. The time charge of 10s. per hour will not bear hardly on the impecunious divorce-seeker in an undefended action, for, with a sederunt of ten minutes and four witnesses examined, the result is exactly the same as for a full hour's sederunt.

The further novelty is the application of the time charge to hearings. Counsel have not the same interest in this matter as have agents, for the latter are personally liable for the dues to be paid according to the time occupied by orations, and it may be expected that, now that time means the laying out of money, agents will be prone to look about them for those pleaders who studiously avoid prolixity.

THE PLEADER.

It is now well settled that a relevant action for reparation for injury due to negligence can be laid though there has been no physical impact on the claimant (*Dulieu* v. *White*, 1901, 2 K.B. 669; *Cooper*, 4 F. 880). The decision of the Second Division in *Brown* v. *Corporation of Glasgow*, 1922, 1 S.L.T. 431, appears to us an extreme application of the principle. The pursuer's averments were, in brief, that while she was walking on the street pavement, a tramcar, through the fault of its driver, got out of control while coming down a steep hill towards a dangerous corner at an excessive speed, and that it was swaying about from side to side in such a manner that she became terrified lest it should leave the rails and mount the pavement, with possibly serious consequences to herself. She alleged that the fright she thus got resulted in a miscarriage. The Court by a majority (Lord Salvesen dissenting) allowed an issue for jury trial. We are inclined to think that such a decision is the limit, and that there will now be a reaction in favour of the view which Lord Salvesen expressed, that "it is desirable, where possible, to limit "claims of this kind to those where the Courts have already "held that there is liability. For my own part, I should "have been disposed to stop short here, because none of the "elements here exists which were present in the other cases, "and which induced the Court, no doubt, to hold that there "was a relevant case."

Notwithstanding the very large number of stated cases which must have come before the Court since appeal by that

procedure was instituted, there does not appear to be agreement as to the proper method of statement of the question of law. Thus, in *O'Brien* v. *Strathearn*, 1922, 1 S.L.T. 440, we find Lord Mackenzie remarking, " The question is not strictly " speaking in form, because it asks, was I right in holding, " &c.? It ought to be, was I entitled to hold on the facts " stated in the case, &c.? Wherein lies the difference? "

In crimes of personal injury, the statements of the injured party after the occurrence may be proved provided in the ordinary case they were made not later than a few hours after the offence. The greatest latitude is allowed in cases of injury to women. Accounts given one or two days after the occurrence are usually received in such cases (Macdonald's Criminal Law, p. 479). In the recent case in England of *Rex* v. *Camelleri*, 66 S.J. 667, it was contended that this principle which was established by *Rex* v. *Osborne*, 1905, 1 K.B. 551, was only admissible in prosecutions for sexual offences against women and young girls. In this case of *Camelleri*, however, the Court extended the principle to cases of indecent assault on males.

In connection with railway claims, the decision of the House of Lords in *Neilson* v. *London and North-Western Railway Company*, 1922, 1 K.B. 192; 66 S.J. 502 should be noted. The company had accepted goods for conveyance to a stated place by a prescribed route under consignment note, which relieved them from all liability for misconveyance or misdelivery or delay " during the " transit " not caused by wilful misconduct. The company's servants by mistake sent the goods, not by the named route, but by a different route. Delay and damage resulted, but the company denied liability on the ground that there was no wilful misconduct, and founded on *Foster* v. *Great Western Railway Company*, 1904, 2 K.B. 306, where it was held that such a loss amounted to " misdelivery " during transit. The principle of that decision has now been set aside. Lord Buckmaster, in delivering the leading judgment in the House of Lords in *Neilson's* case, was emphatically of opinion that " misconveyance " must be construed so as to exclude the conveyance of goods by an unauthorised route, such " misconveyance " being really apart from and not " during the " transit."

The Sale of Goods Act (sec. 32) provides that when the seller requires to send goods to a buyer, " delivery of goods " to a carrier, whether named by the buyer or not, for the " purpose of transmission to the buyer, is *prima facie* deemed

"to be delivery to the buyer." In *Galbraith & Grant, Ltd.* v. *Block*, 1922, 38 T.L.R. 669, the carrier was the sellers' own servant, so that delivery to the carrier was not considered delivery to the buyer. "Carrier" in the section means, apparently, "common carrier." In the case mentioned the sellers were told to deliver the goods at the purchaser's premises, and they did so, obtaining the signature of some person who was on the premises, but had no authority to sign. The buyer, in fact, never received the goods. The County Court judge found there had been no delivery, and refused to give judgment for the price. On appeal, it was held that the sellers had discharged their duty as to delivery by delivering the goods at the place directed, without negligence, to a person having apparently authority to receive them. "He (a seller) cannot know what authority the actual recipient "has. His duty is to deliver the goods at the proper place, and, "of course, to take care that no unauthorised person receives "them. He is under no obligation to do more. If the pur- "chaser has been unfortunate enough to have had access to "his premises obtained by some apparently respectable per- "son who takes his goods and signs for them in his absence, "the loss must fall on him, and not on the innocent carrier "or vendor."

Literature.

THE PUBLIC RECORDS OF SCOTLAND. By J. Maitland Thomson. Glasgow: MacLehose, Jackson & Co.

Beginning with a definition of records as implying primarily a collection or compilation made by order of a Court or recording authority, these lectures deal mainly with and centre their interest in the public records under the charge of the Lord Clerk Register. Dr. Maitland Thomson ought to be better known among us than he is for national service of the highest value, radiating from his official years as editor of the Great Seal Register, and subsequently curator of the Historical Department of the Register House. He has, over and above his eight ponderous Great Seal volumes, done a great work for Scots history, and done it in such an unselfish spirit that no small proportion of his contribution appears under other men's names. Thus he was merely annotator to the chartularies of Lindores and Inchaffray; he edited the posthumous studies of Bishop Dowden on the "Mediæval Church" and on "The Bishops of Scotland"; the dedication of Sir Archibald Lawrie's "Annals of the Reigns of Malcolm and William" is a noble tribute to his service as an auxiliary; and his further labours towards the continuation of the late Sir Archibald's collections have been such as, although, unfortunately, stopped by serious

illness, to make the students of Scottish charters permanently his debtors. Besides all these toils in Scottish record, he was also for a long while the secretary of the Scottish History Society, active in the promotion and direction of its publications. A great worker, he was also an able and very successful organiser. He has well earned the repose which so great and so many performances deserve. But our country seems to have very limited ideas about the public honours and recognitions which might have crowned such a career: and now perhaps such honours would be out of date.

The present volume preserves the substance of the Rhind Lectures delivered by him in 1911. They contain a crisp, interesting, and intimate account of our public records historically traced, described with minute knowledge, and garnished with a dash of wit which at once brightens and heightens a narrative of the origins of the Register House, and the evolution of its infinity of rolls, charters, and accounts, the records of Parliaments and law Courts and titles to land, and the papers of State, whether on foreign affairs or domestic administration, and whether secular or touching many things once in the sheer domain of the Church and now under Government control. How the system grew up is throughout the book a main question of research, and the part played by the old notaries is given its due setting. Early inventories, including the lists of documents taken possession of by Edward I., though for the most part returned, afford much insight into the position of things at the end of the thirteenth century, when, it is evident, the system was far from being a mere embryo. Towards 1367 the Clerk of the Rolls gets to be styled Clerk of the Register and Rolls, a new title probably indicative of a change from roll-form to book-form for the keeping of the minutes of certain important transactions, judicial, legislative, or preserving an exact official memory of charters chiefly of lands granted or confirmed by the Crown. The institution of the Court of Session in 1532 involved material changes and a "special Scottish "development," to use Dr. Maitland Thomson's capital phrase, was the Sasine Register, which had its beginning in 1599, and became almost at once the head cornerstone of Scottish conveyancing. Our records, of course, depended on the parent institutions from which they came, and they reflect no faint measure of credit on the constructive capacity of the officers of State who devised them. The complex required unravelling, and no one was so eminently master of the task as the archivist and scholar to whom we owe this admirable short sketch of the system of records which, by its originality and distinction, has stood the tests of long trial for the public needs, and has at all times efficiently responded. The index with which the Rev. Henry Paton has equipped the volume merits the compliment paid him by the author in the preface. We have noted only one omission, that of the name of Miss Mary Bateson, whom the work itself more than once has occasion to commend. One inquiry we should like to make.

What became of the statue of George III. which was designed to stand in front of the Register House? Surely it was a stroke of good fortune which substituted Wellington's.

Tabular View of Income Tax and Super-Tax, 1842-1923. 5th Edition for 1922-23. London and Edinburgh: Oliver & Boyd. (1s. net.)

This is a useful and ever valuable publication at a most moderate price. Its compiler has clearly aimed at one objective, and has resisted all temptations to stray beyond the immediate subject. It is addressed to income tax and super-tax only, and it deals with no other taxes or duties whatever. It makes no attempt to be exhaustive, but in point of fact it is extremely likely that to many plain people it will supply all they need, and even to experts and in public offices it will be most useful as presenting the necessary data in clear tabular form, and also supplying many reminders and heads of claim. The subject is well spread out, and complication and confusion are avoided. The illustrations of tax allowances and calculations on different incomes and under different family conditions are clear and most helpful. We are not surprised that a fifth edition has been called for, and that is itself an excellent introduction.

The Workmen's Compensation Act, 1906. By His Honour Judge Ruegg, K.C., and Henry Percy Staues. 9th Edition. 1922. London: Butterworth & Co. (30s. net.)

His Honour Judge Ruegg, K.C., who has done such admirable work in the editing of the well-known series of Butterworth's Workmen's Compensation Cases, has, in collaboration with Mr. H. P. Staues, Registrar of the Hanley and Stoke-upon-Trent County Court, put out a new edition of his book on the Workmen's Compensation Act, 1906. This is the 9th edition of this book, the last being published in 1910. It is a far cry since 1910, and much has found its way into the statute book bearing upon the Workmen's Compensation Act since that date, to say nothing of the many important decisions which have been made in the various Courts. The work entailed in giving effect to these changes in the commentary on the text of the Act must have been very great, and the authors can only be complimented in the thorough manner in which it has been done. The arrangement of this book is to be commended. First of all, tables of the statutes and cases relative to the Act are given. Following this is a very excellent introduction dealing shortly with the scope of the Act, and thereafter the text of the Act is dealt with seriatim, with a full commentary thereon which takes in the most recent of decisions. The book concludes with a comprehensive appendix which includes the text of the Workmen's Compensation Act, 1906, and subsequent additions, together with many other relative statutes. The book

should be welcomed by all solicitors whose work brings them into contact with the Workmen's Compensation Act, and its compactness should save much time to the practitioner who consults it. In the preface the authors quite candidly state that no attempt has been made to deal with the practice of procedure in the Scottish Courts other than to include all decisions of importance in the Court of Session, and, while possibly the book may make a stronger appeal to English solicitors, still we think that it will find a permanent place in the libraries of all British solicitors dealing with the Act.

Obituary.

At Kirkbean, Kirkcudbrightshire, on 5th August, Lord Scott Dickson, Lord Justice-Clerk of Scotland. Lord Scott Dickson was born in Glasgow on 13th September, 1850. He was educated at the High School and the University of Glasgow, and also attended the law classes at the University of Edinburgh. He became an apprentice in the office of Messrs. M'Leod & Ralston, solicitors, Glasgow, and later served for a time with the firm of Messrs. Maclay, Murray, & Spens. When his apprenticeship was over he qualified as a law agent, and practised in Glasgow in the years 1875 and 1876. The following year he was admitted a member of the Faculty of Advocates. In the summer of 1877 he was lecturer in the University of Glasgow on Constitutional Law and History, but the claims of his profession early terminated this appointment. Few young advocates at the Scottish bar have ever plunged into such a busy practice as did Mr. Dickson. In his native city he had earned a reputation for shrewdness, common sense, industry, and tact, and Glasgow saw to it from the beginning that he should not lack opportunities of justifying its prescience. In 1896 he was appointed Solicitor-General, and held that office until 1903, when he succeeded Mr. Graham Murray (Lord Dunedin) as Lord Advocate. He ascended the bench as Lord Justice-Clerk in June, 1915, on the retirement of Sir John H. A. Macdonald, Lord Kingsburgh. His selection for this office was a fitting and well-merited crown to his eminent position at the bar, and to his services to the public, and met with universal approval, for he was esteemed by all. Lord Scott Dickson leaves a widow and two sons, the elder of whom is a member of the Scottish bar.

At Threepwood, Lauder, on 8th August, Sir John Rankine, K.C., LL.D., Emeritus Professor of Scots Law in the University of Edinburgh, aged seventy-six. Sir John Rankine was born in Sorn, Ayrshire, in 1846. After graduating in arts at Edinburgh, he studied law there and at Heidelberg, and was admitted to the bar in 1869. He early gained a reputation for scholarly knowledge of the law and obtained a certain

amount of practice, especially in cases involving feudal questions. Although he always retained a very considerable chamber practice, his appearances in the Courts were in later years not frequent. In 1885 he was appointed an advocate depute, and three years later he was elected to the chair of Scots Law in the University of Edinburgh. By the legal profession at large Professor Rankine will be remembered by reason of his important works on the "Law of Land Owner-" ship" and the "Law of Leases." The knighthood which was conferred on Professor Rankine last year was recognised as a well-merited reward of distinguished work in his profession.

At Stocket, on 22nd August, Mr. Alexander Emslie Smith, advocate, Aberdeen, aged fifty-eight. Mr. Smith was a son of the late Mr. A. Emslie Smith, an eminent Aberdeen advocate. After taking his degree at Aberdeen University, he served his apprenticeship to the law in his father's office, and subsequently built up a big legal business. Mr. Smith was unmarried.

Notes from Edinburgh.

Parliament House, 31*st August*, 1922.

The death of the Lord Justice-Clerk, Lord Scott Dickson, is a calamity which will be sorely felt, not only in the legal world, but in all ranks and classes in Scotland, for the late distinguished and well-beloved senator, besides being admired as an ornament of the supreme judicial bench, had his manifold sterling qualities appreciated by people in various official, business, ecclesiastical, and social circles. When he entered the judicial sphere in June, 1915, he had well earned the relaxation from a life of strenuous activity, his career as pleader, politician, Crown counsel, and Dean of Faculty having from first to last been marked by hard work, gone through with such aptitude that the vast amount of business handled by him seemed to buoy him up rather than to make a drain on his vital forces. Spare and fragile looking he was in figure, but toughness of fibre and high courage were there in abundance, and yet he was not given to seek recuperation by open-air exercises in the way most men do. Unlike the majority of busy pleaders, he was no burner of the midnight oil, his old-fashioned, wholesome belief being in the keeping of regular hours, early to bed and to rise, and his strict adherence to this belief undoubtedly operated beneficially in preserving his health and alertness of mind under conditions of severe stress. Homely and blunt in his diction, his oratory was never anything but direct and straight to the point, and when speaking in the House of Commons his

utterances, which English newspapers were satisfied to describe as "pure Doric," commanded pleased attention from friend and foe alike, for in the House of Commons as elsewhere his was a popular and esteemed personality. Simplicity and an entire absence of affectation were distinguishing attributes in his composition. He could not be otherwise than his own natural self, and during the seven last years of his life the exercise of high judicial office was a fitting channel to bring into prominence the great good heart that was in him and the serenity of temper which had come unspoilt through the rough and tumble of a long legal and political life. Always courteous and good-natured in his demeanour towards counsel, the Second Division, the tribunal over which he presided, seemed to have an atmosphere homely and pleasant, while yet dignified, and inexperienced young pleaders would quickly shed their tremors and give of their best in response to the kindly attention bestowed on them by the Lord Justice-Clerk. Lord Scott Dickson, like his immediate predecessor, had sometimes jarring elements to contend with on the bench. The Second Division had for many years before his advent been held in much the same sort of esteem as the proverbial dog with the bad name. Why that tribunal should have earned reproach it is difficult to understand, but it was there until the influence of the late Lord Justice-Clerk became felt, and of recent years the dividing line between the two Divisions of the Inner House, as regards popularity, had been less marked than formerly was the case.

It has often been maintained in these notes that the best-equipped pleader is he who comes to the bar with a good practical experience of the agents' branch of the profession behind him. Two notable examples of the truth of this are to be found in the successful careers of Lord Strathclyde, now in retirement, and the late Lord Justice-Clerk. Both had come through the mill in Glasgow offices, and the latter was prone, when in reminiscent vein, to refer to never-forgotten incidents occurring in his apprenticeship. The careers of both pleaders were very much alike, and, being contemporaries, they were usually to be found ranged the one against the other, both as juniors and seniors. Glasgow has had reason to be proud of the fact that during several years the Court of Session has had as first and second in command two of her sons, and it is satisfactory to know that, with two such brilliant examples before them, the young men of St. Mungo are encouraged to come forward as valued recruits in the ranks of pleaders. A training as process clerk or procurator serves as an excellent initiation into the art of pleading. The

late Lord Justice-Clerk was a master-hand in drawing pleadings, and while he would give credit for lessons learned under the great Alexander Asher, with whom he was with much frequency associated as junior, there is no doubt he had well grounded himself in the art long before he had thought of embarking on the profession of an advocate. He was a purist in the matter of written pleadings, and when on the bench he and the late Lord Dundas, his colleague, who was no less a purist, were wont to give counsel valuable hints as to the framing of pleadings, the hints being conveyed by way of severe criticisms of records more or less loosely framed. Those two judges time and again openly deplored the circumstance that the art of drawing pleadings seemed to be neglected in both higher and lower Courts.

In the space of a little over two years the Second Division bench has been entirely wiped out. Lord Guthrie died in the spring of 1920, and his place was taken by Lord Ormidale, on whose advent the composition of the bench was Lord Justice-Clerk Scott Dickson, Lord Dundas, Lord Salvesen, and Lord Ormidale. Lord Dundas died in the early spring of this year, Lord Salvesen retired in June last, the Lord Justice-Clerk has died in August, leaving Lord Ormidale, the newcomer of 1920, as the father and nucleus of a new Division which has recently acquired Lord Hunter and Lord Anderson. Who the occupant of the vacant chair is to be seems to depend on a question as to whether the Lord Advocate's seat in Parliament or that of the Secretary for Scotland stands the better chance of being retained for the Coalition. Of the two, Mr. C. D. Murray's seat seems the safer in a contest, and this may mean that Mr. Munro will continue to inhabit the side track which has been his for several years. A great many people seem to regard with favour Mr. Munro's chances for the vacant chair, but, weighing up the qualifications of the two, with a new team to be handled, the chances of Mr. Murray being the Lord Justice-Clerk seem stronger than those of Mr. Munro. The latter has been a long time away from the atmosphere of Parliament House, and the piloting of an almost new Second Division will be a task of such importance as to require a pilot who is up to date in soundings. It can be taken for granted that a sound lawyer will be appointed. There is, however, more required for the position than sound law, and the future of the Second Division will be made or marred according to the personality of the new chief, whoever he may turn out to be.

Not long did Professor Sir John Rankine, K.C., live to enjoy the life of ease in retirement which he had so well

earned. In him Edinburgh University had a warm friend since he was appointed to the chair of Scots Law in 1888, and his genial presence was welcome at divers social events which mean a lot to young men living the academic life far removed from comfortable home surroundings. His editions of Erskine's Principles came as a boon to students, who were saved the hideous task of wading through footnotes of earlier editions, which footnotes were more elaborate than the original text itself. His class lectures were made interesting, and as a professor he commanded respect and attention from a succession of students, in the main well-behaved and orderly. His successor, Professor Candlish Henderson, is as regards legal attainments well qualified to carry on the good record maintained by his predecessor, though his youthful appearance is in marked contrast to the venerable and distinguished mien of Professor Rankine, who was one of the few Scots advocates who affected a flowing beard.

The housing shortage is a national trouble widespread, and among the unfortunate people who are hard hit by the scarcity of dwellings available for hire are Sheriffs-Substitute, who as a class may nowadays be regarded as migratory. To buy a house in a rural district, with markets now on the down-grade, is a bad speculation. To rent a house of suitable size is an impossibility, in rural as well as in urban districts. A Sheriff-Substitute must live and discharge his duties in his sheriffdom, and in a remote district it is essential that he should command respect and inhabit a dwelling suitable to his condition. The position of some recently appointed Sheriffs-Substitute in regard to house-hunting would, if written of, make pathetic reading. The State appoints a Sheriff-Substitute and sends him to the back of beyond, careless as to whether he can find a roof to shelter him and his. An official residence provided by the Government would seem to be the correct and fair means to avoid hardships, and in fixing emoluments the rental value could be taken into account.

The rolls published on the first box-day in vacation do not seem to indicate that a time of prosperity is near at hand, the leanest-looking lists of cases to start on being those applicable to the Inner House, those of the Outer House being slightly better. The First Division rolls have enough in them to keep that Court going for about six weeks, and the Second Division can carry on for half that period, and unless the vacation arrivals of work are better than of recent years, there is danger of drought being felt before the end of the year. The First Division short-roll cases awaiting disposal number 35, and there are also 23 summar roll cases; and the Second Division

short roll contains only 15 causes, with 9 in summar roll. Both Divisions have been in the habit of sitting daily until after 4 p.m., and if that habit is to be maintained during the early stages of the winter session, there are going to be no later stages to that session for the Inner House.

In the Outer House Lord Morison is the only judge possessed of a substantial procedure roll, while his array of proofs and jury trials is good. The work is distributed among the five Lords Ordinary as follows:—Lord Sands starts the session with 7 cases in procedure roll, and he has the formidable hearings on evidence in the "Spathari" shipping claims against underwriters. Also, he has 17 proofs and 4 jury trials, fixed down to 19th December. Lord Blackburn has 5 procedure roll cases, 17 proofs, and 2 jury trials, fixed down to 9th January, 1923. Lord Ashmore has 6 cases in procedure roll, 10 proofs, and 9 jury trials, fixed down to 12th December. Lord Morison has 20 cases in procedure roll, 15 proofs, and 5 jury trials, fixed down to 15th November; and Lord Constable has 2 cases in procedure roll, 11 proofs, and 6 jury trials, fixed down to 9th January, 1923.

The rolls of the Outer House judges have been augmented by the new summonses called on first box-day, a pretty thin augmentation, the new cases amounting to only 64, and of these 20 are consistorial, 18 being divorces, 1 a declarator of nullity, and 1 a declarator of marriage. Lord Ashmore heads the list with 27, and 11 are divorces, with the 1 declarator of nullity. Lord Sands comes next with 20, and 4 are divorces. Lord Morison has 9, there being 3 divorces and 1 declarator of marriage. Lord Blackburn has 5, and Lord Constable has 3, with no divorces. The visions of a rich harvest being garnered by way of increased fee-fund dues, recommended by Lord Blackburn's Committee and put into force by Act of Sederunt, would seem to be visions cast on a far-distant horizon. Miserable calling lists for vacation box-days betoken a falling barometer.

Notes from London.

THE TEMPLE, 31*st August*, 1922.

IN "As You Like It" Rosalind tells us that "time travels "in divers places with divers persons," and that it stands still "with lawyers in the vacation; for they sleep between term and term, and then they perceive not how time moves." The old legal terms, as far as they regulated the work of the Courts, are long since vanished, though in the dining terms of the four Inns they still preserve a shadowy existence, but for

these weeks in the summer time does seem to stand still with the practitioner. It is now the very middle of the long vacation; the Courts are closed, the libraries shut, though some of them still carry on with restricted hours; it is the same with the common rooms, even the churches and chapels set apart for jurists close their doors for worship until the month of October. As it is clearly impossible for the community to do without law for over two months, makeshifts are provided. The Vacation Court is open every Wednesday, where a judge sits to hear urgent matters. This month it is the Lord Chief Justice, and on Tuesdays the same high official is on the same class of work in chambers. Then the Masters, or some of them, at any rate, keep on their daily toil, and more or less we have the County Courts always with us. Criminals, very naturally, take no account whatever of these artificial divisions of time; yet even here the vacation does not pass unregarded. By a deft arrangement of dates, the Central Criminal Court, or Old Bailey, as it is usually called, holds no sitting in August, which is also a close time at the Middlesex Sessions, but the Magistrates' Courts and the County of London Sessions function throughout the year without any break. Extra help is provided, so that the judges of those Courts are secured a reasonable respite from their labours. The long vacation affects various classes of lawyers in various ways; to the busy K.C. it is the bright spot in the legal year; if he be, as is often the case, a member of Parliament, the pressure is at times tremendous even to a powerful and well-skilled intellect. He turns away with disgust from his table laden with briefs, and thinks with a shudder of interminable hours of Parliamentary attendance. He dreams of the moor and the river as the time of his release approaches, and then comes the magic cessation from toil, as complete and absolute as the work was hard and incessant. No doubt he has compensations; his large fees and his exalted position impress the outer world as ample recompense for his efforts, yet to himself use has worn the gilt off the gingerbread. It is a necessity of his position that he must go on treading the mill even though the awards have lost much of their attraction and have become commonplace incidents in his daily work; thus he so jealously guards the vacation hours that he allows nothing to interfere with them. Assuredly he is wise in his generation. It is only thus he is able to take upon himself the burden which awaits him when the Courts open again in October. The same thing is true in a lesser degree of the busy junior and the prosperous solicitor. Yet all

lawyers are not busy or prosperous, so that there is a class to whom the vacation is a time of moderate but necessary gains. There are always plenty of men to do the work when those to whom it falls in busier times are absent.

Again, there are some to whom the Temple has at this time of the year an attraction all its own, when its old-world ways and old-world Courts, untrodden by the more prominent figures of the present, are thronged by the mighty shadows of the past who seem to take bodily presence and reappear on the scene. How many names connected not merely with law, but with art and letters, are connected with the Temple! If this is the place where Blackstone wrote his commentaries and Coke pondered epoch-making decisions, it is also the place where Johnson talked and Lamb mused and Goldsmith gave us prose, classic as long as the English tongue shall last. The effigies of crusaders in the Temple church remind us of the founders of the long and famous dynasty of Templars. No century, no decade, nay, one might say no year of all these centuries has since gone by without its famous man or its remarkable achievement. No wonder lawyers are attached to the Temple, so that to some of them its presence seems a necessary of life. To such the long vacation, with its quiet and its time for reflection, is the most precious part of the legal year. These are naturally not the men with swollen fee books or with names known to the man in the street or often in the public eye. They are rather the historians and real students of the law, its records and antiquities. To such men the past is more than the present, and memories more than realities. It occasionally happens that the two types are combined in one person, that a knowledge of the antiquities is combined with great practical ability in their use. To such a man the Temple appeals in many ways. The great example of this rare type was Serjeant Plowden (1518-1585). So immersed was he in the study of the law that it is reported of him " for " three years he went not once out of the Temple." Yet he was a distinguished figure in the Courts of Queen Elizabeth's time. Even to-day his memory is strong in the place where he laboured. He was buried in the Temple church, in soil that must have seemed twice sacred to this oracle of the law. There you still see the alabaster monument where his effigy reposes, while a marble bust of him is one of the most familiar features of the Middle Temple Hall, the hall which is inseparably connected with the greatest figure in English literature, for here the " Midsummer Night's Dream " was

first produced; and if, as seems most likely, the "Comedy of "Errors" was enacted in Gray's Inn Hall, these are the only two buildings in London now standing where Shakespeare's plays were staged in his lifetime.

However associated with the Temple and Inns of Court these reflections may be, they are apt to lead us away from law into the more flowery paths of literature. It is necessary to return to more strictly legal subjects—to say a few words on outstanding legal matters. In the last days of last month the House of Lords delivered a reserved judgment in the case of *Spencer* v. *Hemmerde*. The matter involves points of legal and general interest, whilst the position of the defendant gives it peculiar piquancy. Mr. Hemmerde is a well-known K.C. He holds the important office of Recorder of Liverpool, and also has attained eminence as a playwright by a number of more or less successful efforts, among which "The Butterfly "on the Wheel" and "Proud Maisie" may be mentioned. Unfortunately, he was not exempt from "that eternal want "of pence which vexes public men." In March, 1910, he borrowed £1000 at an agreed rate of interest. He neither paid principal nor interest, but on being pressed for the debt he, on the 1st November, 1915, wrote to his creditor that he was not able to pay at present: he was willing, but he could not. Now, by the statute of limitations known to English lawyers as the 21 Jac. I., c. 16, it is provided (sec. iii.) that no simple contract debt is recoverable unless proceedings are commenced within six years from the incurring of the obligation. By a series of decisions it was held that, if the debtor acknowledged the debt in writing, he renewed the obligation to pay, and the statute did not operate until six years after the date of such acknowledgment. Before this period expired proceedings were taken against Mr. Hemmerde. He pleaded the Act, whilst it was argued for him that the letter which merely stated his inability was not sufficient to take the case out of the statute, since no new promise to pay could be inferred from it. The point was rather a nice one, as there were decisions of equal weight directly contradicting one another on this very question. The case came first before Mr. Justice Bailhache, who held that the letter took the case out of the statute, so that judgment must go against the defendant. Mr. Hemmerde went to the Court of Appeal, where there was a pronounced diversity of opinion. Lord Justice Banks thought the letter insufficient to suspend the statute, so he decided that the Court below must be reversed. Lord Justice Atkin agreed with him, whilst Lord Justice Scrutton was of the same opinion as Mr. Justice Bailhache.

Mr. Spencer appealed to the House of Lords, who unanimously decided that Mr. Justice Bailhache was right. One of the law journals rather sarcastically observes, "It must be a great "satisfaction to the defendant, himself a member of the Inner "bar and Recorder of Liverpool, that he has been the occa- "sion, if not the cause, of settling a moot point of great "interest to debtors." If Mr. Hemmerde does feel satisfaction, it must be of a tempered description, since he lost his case, and success or failure is to most litigants the main, if not the only, interest in the matter.

One other point deserves a word. Lord Justice Scrutton, in the Court of Appeal, in giving judgment, made some strong remarks on the conduct of a member of the bar in setting up such a defence. It is difficult to say how far a judge is entitled to go in making reflections on the morality of the proceedings before him. He is clearly entitled to do so if the matter is directly involved in the case he is trying, but here it was not. Mr. Hemmerde was merely taking up a position which he believed the law entitled him to take up; it was not suggested that he or his advisers had done so in an improper way, so that the observations were irrelevant, and might well have been spared. In a case under the betting Acts, when it was suggested that the defendant should be deprived of his costs on account of the alleged immorality of his plea, Lord Justice Atkin pointed out, with obvious truth and justice, that to do so would be a reflection on the Legislature, who in their wisdom had thought it advisable to make bets irrecoverable at law. Lord Justice Scrutton is one of our soundest and ablest judges. In all likelihood he will succeed to still higher honours, yet it may be respectfully doubted if he has any right to turn the judgment-seat into a pulpit.

The two criminal cases of *Rex* v. *Dunn and O'Sullivan* and *Rex* v. *Allaway*, better known as the Sir Henry Wilson and Bournemouth murders, both went to the Court of Criminal Appeal, and were both dismissed, so that the criminals were left to pay with their lives the penalty of their crimes. Both cases, for one reason or another, excited wide popular interest, but the only point of legal importance was that set up on behalf of the murderers of Sir Henry Wilson, that they were entitled to address the Court that tried them as they pleased and how they pleased. As they were evidently bent on making a political harangue, Mr. Justice Salter had stopped them, pointing out that the only question for the jury was, had they murdered Sir Henry Wilson? On that they had every right to be heard, but on that only. In such matters a judge is

obviously in a difficult position; he is naturally unwilling to silence the prisoner who is on trial for his life, yet it may become necessary for him to do so. In this case the judge thought the necessity arose. His judgment was supported by the Court of Criminal Appeal on grounds which, as explained by the Lord Chief Justice, seem unanswerable.

NOTES OF ENGLISH CASES.

The following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

127. Treaties of Peace (Austria and Bulgaria) Act, 1920. Order in Council. A testator gave an annuity to his nephew, an Austrian subject, "until he should voluntarily or involuntarily alienate the same or some part thereof." *Held* that the charge under the Order was not an involuntary alienation, and that the annuity had not been forfeited, but passed to the Administrator of Austrian property. *In re Biedermann-Best* v. *Wertheim and Others*, C.A. 27th June. 38 T.R. 778.

128. No. 199, volume xxxvii. 37 T.R. 884, affirmed. The imposition by the Food Controller of 2d. per gallon for a licence to sell milk is a tax, and *ultra vires*. *Attorney-General* v. *Wilts United Dairies, Limited* (H.L.) 29th June. 38 T.R. 781.

129. Lands Clauses Act, 1845, sec. 68—Railways Clauses Act, 1845, sec. 6—where land is taken under the Acts there is a right to compensation for remaining land being injuriously affected, but where no land is taken, compensation is excluded. *Rockingham Sisters of Charity* v. *The King*, P.C. 29th June. 38 T.R. 782.

130. No. 81, *supra*, 38 T.R. 465, affirmed. Liquidation of bank—claims—date of fixing rate of exchange. (*a*) In a claim on current account the date was fixed as at the closing of the account, as against the date of winding-up order; (*b*) in a claim of damages for breach of contract, the date of breach was fixed as the date for conversion into English money. *British American Continental Bank, Limited—in liquidation*, C.A. 29th June. 38 T.R. 785.

131 Trust—annuities free of Income Tax. The trustees paid to the annuitants the full amount of the annuities out of profits from which Income Tax had been deducted. The annuitants obtained repayment of the income tax. *Held* that the sum repaid belonged to the Trust Estate subject to adjustment of the rate. *In re Pettit-Le Fevre* v. *Pettit*, Ch. D. 30th June. 38 T.R. 787.

132. Patents and Designs Act, 1919, sec. 7 (3)—application for extension on account of loss through war. Where a patent is assigned and the patentee and his assigns apply, the loss suffered by the patentee may be taken into account. *Re Summers Brown's Patent*, Ch.D. 13th July. 38 T.R. 818.

133. Medical fees. The Court reduced the fees charged as being excessive. Considerations that affect the amount of fees. *Pratt* v. *British Medical Association*, 1919, No. 240, vol. xxxiv. 35 T.R. 14 referred to. *Gaster* v. *Hirsch*, K.B.D. 4th July.

134. Criminal law—jury trial. The misnomer of a juryman is not a ground for upsetting a verdict. *Rex* v. *Bottomley*, C.C.A. 7th July. 38 T.R. 805.

135. Declaratory action for the construction of a letter of guarantee, Order xxv., rule 5. The Court refused to construe the document on the ground that litigation had not arisen and might not arise. *Clydesdale Bank, Limited* v. *London County, Westminster and Paris Bank, Limited*, K.B.D. 5th July.

136. Administration of Justice Act, 1920, sec. 2 (1)—right to jury trial. This section leaves the right to the discretion of the judge. *Observations* against the policy of the statute. *Ford* v. *Blurton—Ford* v. *Sauber*, C.A. 7th July. 38 T.R. 801.

137. Arbitration—ouster of jurisdiction of the Court—public policy. The rules of the Sugar Association provided that neither party should require the arbiters to state a special case, nor apply to the Court to have a case stated. *Held* against public policy and void, and award set aside. *Czarnikow & Co., Limited* v. *Roth Schmidt & Co.*, C.A. 7th July. 38 T.R. 797.

138. Ship—collision—maritime lien. Vessel in fault owned by Sovereign State—subsequent transfer to individual owner. In such circumstances the lien cannot be enforced against the individual owner. The exemption remains effectual. The "*Tervaete*," C.A. 12th July. 38 T.R. 825.

139. Fire insurance—estoppel. Clause 11 in the policy provided that if the insured did not give full particulars of his loss within 15 days, he would forfeit all claim. Clause 12 provided that to enable the company to adjust the loss they should be entitled to enter into possession, &c. They entered into possession. *Held* that they were estopped from pleading clause 11. *Yorkshire Insurance Company, Limited* v. *Craine*, P.C. 20th July. 38 T.R. 845.

140. Local Government—definition of the phrase "to supply electrical energy." Southport absorbed the urban district of Birkdale. The Birkdale District Electric Supply Company "supplied" the lamps and tramways in Birkdale. Southport superseded this supply. *Held* that the word "supply" implied a buyer and seller, and that Southport had a right to make and use their own electricity. *Attorney-General* v. *Mayor of Southport*, Ch.D. 24th July.

141. Will made without legal advice—meaning of word "money." *Held* that in such circumstances the word was to be construed in its popular sense, and included not only sums repayable to the testatrix, but permanent investments of a personal or moveable character. *Re Taylor—Taylor* v. *Tweedie*, C.A. 25th July. 38 T.R. 850.

142. Treaty of Peace Order, 1919—dual nationality. Petitioner was born in England, but acquired a German nationality, and had thus a dual nationality. *Held* that his German nationality was alone to be considered and that his property fell to be administered under the Order. *Chamberlain* v. *Chamberlain*, K.B.D. 37 T.R. 966,

approved. *Kramer* v. *Attorney-General*, C.A. 26th July. 38 T.R. 854

143. No. 40, *supra*, 38 T.R. 114, affirmed—nationality of Englishwoman married to German between Armistice and Treaty of Peace—British nationality and status of Aliens Act, 1914, sec. 10. *Held* that she was a German, and that her property was subject to the charge in the Treaty of Peace Order, 1919, sec. 1 (xvi.). *Fashender* v. *Attorney-General*, C.A. 20th July. 38 T.R. 852.

144. Housing, Town Planning, &c., Act, 1919, secs. 28, 39, 40. Housing, &c., Act, 1909, secs. 14 and 15. The powers given to a local authority under the first Act are not affected by the rental limitations contained in the second Act, which apply to landlord and tenant only. *Arlidge* v. *Tottenham U.D.C.*, K.B.D. 3rd July. 38 T.R. 819.

145. Reinsurance—Marine Insurance Act, 1906, sec. 9 (1), 62 (9), 81. A material alteration on the terms of the head insurance without the knowledge and assent of the reinsurers relieves the latter from liability. In this respect it follows the contract of suretyship. *Norwich Union Fire Insurance Society, Limited* v. *Colonial Mutual Fire Insurance Co., Ltd.*, K.B.D. 4th July. 38 T.R. 822.

146. Interpretation Act, 1889, sec. 38 (2). This section was applied to the right of a tenant to compensation under sec. 11 of the Agricultural Holdings Act, 1908, notwithstanding the repeal of that section after notice of claim given. *Hamilton-Gell* v. *White*, C.A. 27th June. 38 T.R. 829.

147. Probate—Government of Ireland Act, 1920. Order of Council, 1922, Articles 2 and 3. Irish grants of letters of administration will be sealed as heretofore. *Note.*—This applies to Scottish confirmations under Confirmation and Probate Act, 1858, sec. 13. *Re Brogan deceased*, P.D. 17th July. 38 T.R. 843.

148. Income-Tax Act, 1918, secs. 4 and 5. Finance Act, 1920, sec. 18. The personal allowance provided for in the latter Act in the case of Income Tax is not given in the case of Super Tax. *Davies* v. *Commissioners of Inland Revenue*, K.B.D. 27th July. 38 T.R. 856.

149. Maritime lien. The lien of the master for wages and disbursements is preferable to the claim of an execution creditor. *The "Ile de Ceylan,"* P.D. 10th July. 38 T.R. 835.

150. Income Tax Acts, 1842, sec. 105, and 1918, secs. 37 (7) (*b*) and 40. Exemption of charities—*ejusdem generis* rule. The exemption applies to the balance of the yearly profits of a business carried on by trustees under the will of a testator. *Rex* v. *Special Commissioners of Income Tax—ex parte Shaftesbury Homes and "Arethusa" Training Ship*, K.B.D. 25th July. 38 T.R. 860.

151. Husband and wife—aliment. (1) In fixing the amount of permanent aliment to be allotted to a wife on separation, the husband's liability for all the King's taxes must be taken into consideration. (2) The relative proportion allotted to the wife should also be tax free. *Dayrell-Steyning* v. *Dayrell-Steyning*, P.D. 29th July. 38 T.R. 898.

152. Negligence—fatal accident—compensation. This should be restricted to actual pecuniary benefit expected. It is not competent

to add a compassionate allowance. *Royal Trust Company* v. *Canadian Pacific Company*, P.C. 31st July. 38 T.R. 899.

153. Statute of Limitations, 21 James I., cap. 16, sec. 3—new contract. *Held* that letters written by the debtor constituted a new contract within six years before action brought, and elided the statute. *Spencer* v. *Hemmerde*, H.L. 28th July, 38 T.R. 869.

154. No. 182, vol. xxxvii., 37 T.R. 816, affirmed. Trade Union Act, 1871, sec. 4. Injunction to restrain expulsion from unions by reason of participation in a copartnership trust in contravention of a rule of the union. *Held* (*a*) that the Court had power to entertain the action; (*b*) that what the plaintiffs had done was not in breach of the rule and did not justify expulsion. *Aitken* v. *Associated Carpenters*, 1885, 12 R. 1206, dissented from. *Amalgamated Society of Carpenters, &c.*, v. *Braithwaite and Others*, H.L. 28th July. 38 T.R. 879.

155. Companies Act, 1908, sec. 82. (1) Action by official liquidator against a promoter for illegal profits made on sale of debentures and shares. *Held* that as these had not been legally issued in terms of above section, no action would lie. *Re Jubilee Cotton Mills Limited, in liquidation—Liquidator* v. *Lewis & Demery*, C.A. 28th July. 38 T.R. 891.

Appeal Cases under Workmen's Compensation Act, 1906.

156. Sec. 13, schedule i., paragraph 2 (*a*)—remuneration exceeding £250 per annum. A pilot worked for ten weeks at an average weekly wage of £6 out of a pool. He was then killed. *Held* that as the employment might have become irregular or rate of payment might have fallen, his remuneration did not exceed £250 per annum. *Thomson* v. *Mackay*, H L. 24th June, 1921. 37 T.R. 861.

157. Sec. 13—employment otherwise than by manual labour. A master of a tug, who did also manual work on the tug, *held* not within the Act. The test is the substantial nature of the employment. *Jaques* v. *Owners of Steam Tug "Alexandra,"* H.L. 4th July, 1921. 37 T.R. 881.

158. Workmen's Compensation Act, 1906, sec. 1 (2) (*b*) (4). Where an action is brought for damages for injury by accident and fails, the plaintiff can ask the Court to assess compensation under the Act, and to give a certificate of an award, but his election is final and he cannot appeal in the action. *Harrison* v. *Wythemoor Colliery Company, Limited*, C.A. 25th May. 38 T.R. 694.

159. Declaration of liability for probable future incapacity. Where the workman returns to work at equal wages he is not entitled to such a declaration without evidence of probable future incapacity. *Foster and Others* v. *Wharncliffe Woodmore Colliery Company, Limited*, C.A. 1st June. 38 T.R. 729.

Appointments, Business Changes, &c.

New Scottish King's Counsel.—The King has been pleased, on the recommendation of the Secretary for Scotland, to whom the names were submitted by the Lord Justice-General, to approve of the rank and dignity of King's Counsel to His Majesty in Scotland being conferred on Mr. James Anderson Maclaren, Mr. George Aitken

Clark Hutchison, Mr. David Mackay Wilson, and Mr. T. Graham Robertson.

Edinburgh.—The following gentlemen have been admitted members of the Society of Writers to His Majesty's Signet:—Mr. John James Bonar, LL.B.; Mr. David Griffiths Prosser, LL.B.; Mr. George Alexander Roger, LL.B.; Mr. Arthur Henry Cecil Hope, B.L.; Mr. James Greenshields Greenshields Leadbetter; and Mr. Ewyn Alastair MacEwen.

Mr. William Wilson, advocate, has been appointed Regius Professor of Public Law in the University of Edinburgh, in room of Professor Sir Ludovic Grant, Bart., resigned.

The Society of Procurators and Solicitors of Forfarshire (Forfar District).—The annual general meeting of the Society was held in the Procurators' Room, Sheriff Court Buildings, Forfar, on Thursday, 27th July, 1922.

Before the business of the meeting was proceeded with the Dean referred to the death of Mr. William Anderson, solicitor, Brechin, who was admitted as a procurator in 1876.

Mr. A. MacHardy (the Dean) reported that he had signed a Memorial by the Society of Writers to the Signet and other legal bodies in Scotland to the Secretary for Scotland regarding the serious difficulty and burdensome cost occasioned to litigants owing to the scarcity of messengers-at-arms and sheriff officers throughout the whole country, and suggesting the appointment of a Departmental Committee to inquire into the whole question of the executing and carrying out of diligence. The meeting unanimously approved.

With reference to the remit made by last general meeting to Messrs. R. F. Myles, D. S. Whitson, and the Secretary, regarding procurators for the poor, the secretary reported that the Committee had prepared an exhaustive Memorial, which was forwarded to the members of Parliament for Forfarshire and the Montrose Burghs respectively, and that copies had been sent to the other legal societies throughout Scotland, along with a circular letter urging them to direct the attention of their respective members of Parliament to the present unfair and anomalous position. The majority of the replies received were sympathetic. He further stated that the matter had now been taken up by the Incorporated Society of Law Agents in Scotland. It was unanimously resolved to renew the remit to the same Committee in order to keep the question alive. Mr. Myles agreed to attend the next meeting of the Incorporated Society to press the matter.

The treasurer's accounts for the year ended 30th June last, which had previously been audited by the Dean's Council, were submitted to the meeting and approved of.

The meeting then proceeded to the election of office-bearers for the ensuing year, when the following appointments were unanimously made:—Dean of Faculty, Alexander MacHardy, Forfar; Vice-Dean, James Davidson, Kirriemuir; Secretary and Treasurer, Alexander Hay, Forfar.

THE

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THE POETRY OF LAW.*

IT is the privilege of the essayist who in this class of composition so little professes to be master of his subject, nevertheless by the sole exercise of the faculty of choice, to declare himself undisputed master of his title. As Titular Pretender he may carve his kingdom according to the meridians of that august audacity which declared "all knowledge to be its province" or at his pleasure wear the purple in some less cosmocratic empire of wisdom or of imagination. Though courage fail he may readily find other forces to assure him that on such adventures a homespun "motley is the only wear"—the royal livery of those who pass the bounds where not philosophers but jesters shall be kings. For it is the particular advertisement of the current description of these occasional and desultory writings not only that the Prince in right of title is self-crowned, but that the progress may only pass for royal upon the accord of an indulgence which allows pretension to outrun the measure of achievement.

Upon such parades an idle speculation is not less welcome than an illustrious companion. What, then, if only to postpone a parting, would have been the attitude of the master essayist, the great Chancellor himself, had such a subject as the Poetry of Law been proposed for his acceptance? Would the judicial eye have wavered for a moment in its pursuit by way of somnolence of the blindness that attends on justice, and have regarded with anxiety and even with distrust the proud insignia of the judicial motley? Would the Grand Occupant, while continuing to assert the occupancy, have found himself less certain in the matter of the occupation of his province? Or would that still undaunted, still arrogant Provincial, have faced from the unaccustomed angle yet another

*Valedictory Address delivered to the Edinburgh Juridical Society by Alexander Moncrieff, K.C., sometime President of the Society.

survey of that province—with undiminished ardour, although so experienced and critical a traveller? Let these grave matters upon a fit occasion give exercise to reverent debate. We who in this Society have our tradition as hierophants alike of law and laughter, have our own special warrant to devise for this great Elder Brother a solution at the same time irresponsible and gay. If one may concede for a moment, though with derision, the conclusions of the cryptograms, the great Aphorist of knowledge, faced with such a choice, had singularly small occasion to go afield in search of cyclopædic promptings. It is to be assumed that the Keeper of the King's Conscience knew the law. It is not to be disputed that he was a poet, howsoever pseudonymous, who wrote the plays. If the world were now to be the richer by yet another of Lord Bacon's Essays, may we not invite fancy to assure us that this wealth would perchance have reached us as incident to the solemn perpetration of a jest? It pleases me to surmise that, faced as I have figured him with the "blank misgivings" which (we have assurance) wait even on a Chancellor "moving about in worlds not "realised," Lord Bacon would have had the wisdom to find occasion merely for amusement, would have seized the opportunity of affording material to edify his editors, and would have followed with unashamed anachronism his own Shakespearean method. And so in these high parallels might this adventurer have found his orient by the simple expedient of forestalling the laughter of the centuries, have contented himself with "combining his information," and within his own experience have sought "for poetry under the letter P and for "law under the letter L?"

But while it may be recognised that the exercise of the synthetic method pursued on such a plan imperiously calls for the attainments of a master, it is well that any member of a Juridical Society should assert as prominent the paramount importance in all affairs of letters, the categorical imperative in all that touches poetry, of some measure of synthetic outlook. As practitioners of law we are all of us overtrained, within reach at least of spiritual disaster, in the use and exercise of methods of analysis. It is so necessary as a feature of our professional routine that we should pursue our task of the presentation of ideas by chasing in pursuit of logic selective and in consequence misleading views of structure; our accepted method is so inevitably atomic in its aim, that we are only saved by the very imperfection of our processes of atomising from the tragic fortune which attends on Custom, and faces its votaries without warning with the hazard of making a dis-

covery and sustaining a surprise. Unless we are prepared to learn from the Humanities some measure of restraint in the exercise of our analytic art, we may be taught by the Humanities with disconcerting suddenness that in pursuing accuracy we have only succeeded in escaping truth. It is very easily possible to sterilise imagination; and this is the fate of those who follow the practice of thinking with too uniform precision. Dreams have their native atmosphere within the storm centre of emotion. With any alteration of the refractive index of the commonplace, with the sustained demand for that clarity of outline which (as in the case of syllogisms or crystals) is the property of particles, such dreams with their attendant width of outlook are apt to be dispelled; and when an old man has ceased to see visions or a young man to dream dreams, it is at best an outcast's recompense that he should have gained the faculty of seeing without distortion a world in fragments which he himself has fashioned. For the practising lawyer, except he would suffer blindness to the poetry which is implicit in his calling, interest no less than duty calls for resolute assertion of the doctrine that identity does not reside in atoms, that the substance of truth or beauty may be refined away, and that except in cases where a measure of magnitude attends upon position, the law of Personality is more indifferent than any Prætor among us all.

Yet even in the department of constructive thinking which holds a foremost place among the premises of poetry, the method of analysis, if we observe the tides, has its own permitted range of operation. Where it is desired to establish a parallel between pursuits apparently so diverse as poetry and law, it is legitimate and even necessary to give separate consideration to substance and to form. So far as the parallel is concerned with form, the elements of unlikeness are at least the more apparent; and yet a single yet noteworthy identifying element does not require extended search. In all the manifold departments of his calling, whether as lawgiver it be his function to ascertain and enunciate a principle which, apart from particular application, may avail to settle the conflicting claims of human actors in some particular relation; as framer of a code to collect and systematise the wisdom of the past; or in the dramatic conflict of the forum with appropriate improvisation to stage or to enact the perpetual comedy, in which incorrigible Invention exchanges ironies with the established currencies of Tribute; it is an austere condition of his calling that the lawyer as craftsman is dependent upon instruments, the use of which is daily common to Mankind. The musician has

his keyboard; the painter has his brush; but the lawyer, with the poet, must find expression through the exercise of Thought, which is reputed to be general, and in the use of Speech, which is admittedly too prevalent. Even among members of this Society I anticipate that I would be called to purge myself of partial counsel if I should suggest that in their attitude towards speech, that most sensitive of human instruments, the lawyer and the poet have been influenced by precisely similar considerations. It may be, to revert for a moment to the methods of analysis, that, for example, Shelley has given greater prominence to the element of music than has Stair; or that the learned framers of the forms of process (and I have more particularly in view a style of a Summons of Reduction which is, I understand, still current) may have in this connection something to learn even from the minor poets of the day. It may be because of the lack of this very element of music, but in any case he would be a Devil's advocate who should dispute that there is something absent from (or perhaps something present in) all legal writings, which leaves them less adapted than poetry to invite resort from those who find themselves actively engaged with the stresses or at the crises of life. Convinced and adept would that practitioner be who at any stage of his sentimental journey should turn for fortitude or consolation to the numbered lyrical effusions of our great master, George Joseph Bell. And yet on the faith of our own maxim, *Quot homines tot sententiæ*, is it not permissible at least to question whether such exponents of our mystery may not yet be found? We have the recent word of a Lord Chancellor that during the years of nurture his infant fancy chose to wander among the curious writings of the Feudal Law. We have the record of the Victorian poet, full of age and honour, who found it appropriate to celebrate the coming of his soul's release with an armoury of volumes designed to advertise the presence of the works of Shakespeare. Since men at either end of life have been indeed content with what so poignantly would discontent us, must not apprehension be on guard against the coming of another race of lawyers, some "later "loftier Annie Lee," a race so sensitive to the poetry of law that they will choose to make the great passage to the ring and rhythm of some institutional sentence? With how appropriate a gesture might such a stalwart make the last surrender, and fare before the Last Assize, under the tart anodyne of the repetition of some well-remembered passage such as "Proceed-"ings not unimportant on the part of the obligee known to and "permitted by The Obligor."

And now to emphasise a parallel and to recognise a difference attaching to the attitude towards language on the part of these related if unequal arts. It has been discovered by one, whose name I have not searched for, but whose discovery may claim to be itself in a sense poetic, that we read new poetry not for present but for future enjoyment. I class this sentence with discovery, because to me it seems to contain the necessary elements of surprise and truth. There is, indeed, no better test of truth than that its recognition should be attended with surprise. And yet, apart from any sense of attending pleasurable shock, is not the saying indisputably true? The verse which on first reading delivers its full message may have usurped the form but holds little of the content of poetry. The thought which is endowed with vitality so radiant as to leap by its own impulse towards expression in a form resplendent as itself; the messenger whose charge it is to tell of "the light that never was on sea or land" can teach, as having learned, the last secret of the sensitiveness of atmospheres. Such thought will not be found deficient in all the qualities of a delicate volition, and in its approach will follow rather the grace of a personal than the law of a physical relation. The Bright Stranger does not at first attract. Where there is something to reveal an ordered economy presides over the process of revelation. Where there is a gift to receive, a grace to win, how reluctant are the faculties to disturb their fugitive familiarities! And law, even for the adept, enjoys with poetry this ruling quality that leaves it always unfamiliar. For the adept, indeed, if I may speak without experience, the period of shyness and constraint is gone. The period of enjoyment has come, and even of enjoyment of his own perplexities. I have found, indeed, that the aspirant for legal favour is also frequently perplexed, yet only rarely that he has mistaken this sensation for enjoyment. For such enjoyment he must wait, but he may wait with confidence. When the detached sentences and departmental laws have begun to group themselves together; when the innumerable applications, after having exacted the devotion of such labour, have taken a place as principally illustrative of and therefore as resumed in principle; when principle itself is recognised as proceeding not from the impulse of the lawgiver, but from the *enixa voluntas* of the law; the aspirant as adept, though all unconscious of the passage, will find that he has now already joined the ranks of those who can consider without impatience the title of this essay; that he can in the practice of law more surely than by pursuit of poetry discover the inspiration of a sufficient

daily fortitude; and "that perhaps only in law and the higher "mathematics (as has been said by Stevenson) may intellectual "devotion be maintained sufficient to itself without reaction, "and find continual rewards without excitement."

By such *Illuminati* the parallel with poetry, however, will not be treated as exact. If the lawyer and the poet were to exchange glossaries, and the craftsman in one art to employ the idiom of the other, the "far off interest" of deferred enjoyment would fall to enter our accounts as a very doubtful asset indeed. It may be supposed that there is a limit even to the patience of conveyancers! And if the serenity which is our heritage is to be transmitted undisturbed, it is to be hoped that any such experiment, if made, will be the experiment of poets. It may be that a singer will be found who, in detail of beauty, will deftly use the language and observe the particularity of an inventory. It may be that (without affront to Apollo or his priest) the "*arsit Atreides medio in triumpho*," the rapture of the Hero, which robs him of his wreath, will be found to have been kindled at the torch of chaste assault on the indomitable virginity of Themis. Yet that the thought may keep its thread let not the fortune of the lover divert attention from the poet. "*Illi robur et aes triplex Circa pectus.*" By his intrepid choice he will be called to grapple not only with unusual terms and formularies of address; he will be charged not only to rescue Beauty from the crowd of "furious persons" among whom enlightened Statute Law has placed her ("women "lunatics and other furious persons," says the statute), but under stress of the rare ether of his "faery land forlorn," he must find breath for that uninspiriting prolixity which ingenuous laymen believe they have discovered in the law. Yet so disputable is any such prolixity that, in happy contrast, the more fortunate disciple of the law, though he disdain experiment, may claim to have already matched the poet, if not in music, yet at least in artifice of speech. The strange locutions, the seeming circumlocutions of the styles have each for the trained ear their element of actual and vital function. The poet makes a step towards vision when he chases "fancies "that break through language and escape." But from language, except with resulting loss, there must be no escape for law. The cumbrous shackles of a phrase that received interpretation when our law was young do not attend with music upon the interchange of current thought. But they are the warrant, and their clatter is welcome as the warrant that Thought so subversive of order when unchained has submitted in the general interest to an honest bondage for the service of

the State, and will answer the citations of the citizens with a uniform award for all. The fashion of a phrase may thus defend its late survival as the badge of citizenship which imperial Thought consents to wear; or like old-world raiment may be content to exercise only the modest magic of Recall, stirring the echoes which fill the temples of Remembrance. And law, whose oracle is echo, must keep the symmetry if it would advance the poetry of order, and so may proudly serve this ritual of memory. Finality and Recollection are golden apples such as might be plunder even for the least instructed of the poets. And so if our ancient language will stick to its own last and suffer this to be handled only by freemen of the craft, the Veteran Cobbler may still find heart to flutter his awl by the side of those who wield the authentic plectrum of Apollo. If the record of performance is to be his franchise, what poet has surpassed in fabric the epic of our latent record of the progress of the race; the drama in which, as iron sharpeneth iron, we give free play to the clash of naked thought; the tension of language and address which within the limits of our own projection pursues the shortest passage between the poles? It is under stress of the demands of law itself and not only by inheritance of Latin speech that our records and debates have kept the pitch of their own lyric fervour. The idiom which controls in rapier play the contest between adverse rights, must be tonic with the qualities of steel. The language which dispenses the commission of Authority fitly to preside over the affairs of men, must strive with golden trumpet towards eminent interpretation, finding gold pure for its office as is transparent glass. And in attendance on the issue of the Final Code that shall immutably be graven on tablets of stone; awaiting the coming of our Lady of Stone at whose austere regard his effort shall be struck immortal and the weary Atlas shall have rest; has not our Titan of the law found native speech as patience brought enlightenment with which to welcome in poetry authentic as his vision the final abdication of his power? It is not in the language of the law that we have learned with most finality how idle is the fulfilling of the law. But for limitation of his function as prelude to ultimate release, that language has caught and fixed an aspiration dynamic to invoke the Liberty which shall transcend the law. And we who accord seniority and precedence to the Law of Nature among the systems which co-exist for the regulation of public and of private right, as an incident of our dull art of classification and definition, have stumbled on the utterance of an enduring scripture, and have chanced on the confession

of a faith. The Tired Giant shall have rest, upon the witness of his own assent to the gospel of the limitation of his rule. In royal robes yet with the javelin discarded for the harp, Saul shall be made free of the innumerable company of prophets who have sung "except the Lord keep the city the "watchman waketh but in vain."

It is as watchman on the barriers of progress that the functions of law in point of substance have their true parallel with poetry. By the discoveries of poets, those venturers in dreamland, those messengers from the unknown, Man has been persuaded to discard the Enmity which, setting every hand against him, left him in primal isolation, and so independent of the law. From worship of brute Nature, through lust for women to tolerance for men, he has passed under their promptings through the completed stages of his history; and for the edification of embryologists has made progress through the making of relations towards ascertaining the purpose of his life. And law as Economist, though never as Discoverer, has toiled behind the poets with the provision of perpetual endurance for the fleeting wealth which they have won. The Lawmaker in the exercise of his demiurgic art must look to less sedate Adventurers to furnish the material for his construction. Ordained to dwell in the temples he has builded, barred from the restless canvass of undiscovered precious things, he takes imperial tribute from strangers to his rule. His homely and sufficient task begins and ends with fashioning the fabric which counts for most in the daily lives of men. Every link of the Love which, when world master (whether we trust to wisdom or experience) shall make men free, ere it can exercise its office of attachment must suffer the moulding or know the hammers of the law. And men, until the rule of Law expands and poets bring enlightenment, must take the liens of opportunity for chains! Let men be bound together even with intolerable bonds—*Tantum religio potuit suadere malorum*—until they have learned the meaning of their bondage, that it is not good for man to be alone. That is the message which the poets have told. There is an aspiration only to be realised through law. It is Poetry that with untutored inspiration has beckoned Opportunity and stirred Desire, sounding the long recall from brutal solitude and savage hunting. It is Poetry that has eclipsed, with glimpses of consenting Beauty and enlightened worship, the sullen vista of outraged captives and base and minatory gods. But it is Law that, with untiring industry, yet with insight and imagination, perpetually renews and insensibly extends the actual gifts of opportunity, and dispensing offices constructive and poetic, presides over the commerce,

the conflicts and the intercourse of men. If some cave-dweller under the impulse of some insistent pterodactyl should have been driven through the centuries to take refuge in the streets of some city of to-day, with what stirring of bewildered admiration (as of distaste) would the pageant of the poetic work of law have passed before him! Under what invisible armour of personal protection could strangers mingle with crowds of strangers, intent on the pursuit of private interests without concern for the preservation of liberty or life? By what established practice of mutual concession did the streams of traffic follow unconflicting lines? By what provision of imponderable values was the market cleared for the traffic in commodities, so that the buyer by some sleight of credit obtained his chosen merchandise without the visible cumber of exchange? And in case of the emergent invasion of private right, under what mantle of authority did a single citizen unarmed assume to separate the combatants, and without interference or resistance to apprehend the persons of the wrongdoers? Had the cave-dweller been himself a poet gifted with insight for less visible things, with what amplitude would he not have celebrated this pæan of our past. With back conscious of the burden, yet with hunger ever stalking his exiguous store, would not envy have informed his admiration for the facilities with which law expedites the course of transport: the contracts of through carriage with their obvious opportunities and complex distributions; the bills of lading which put in commission the course of dealing with impounded merchandise; the bills of exchange which fix in local strongholds the domicile of gold, lest the barratries and piracies of the seas attend so vulnerable a passenger, or the occupation of his bodyguard withdraw the prize of cargo space from fruitful merchandise? With back still conscious of the lash, would he have savoured slavery or freedom in the rhythm of our workshops, where the swing of the hammer is timed upon the dial whose appropriate divisions have been ascertained by law? And as lord of captive women, yet captive if only through possession to women whose security brawn matched with brawn could not secure; as insolent avenger exulting in the exacting of a price, yet chilled in swift reaction to appraise in all he accounted precious the foolish tenure of those who await the vengeance of strong foes; would he have responded to the call of Freedom or to the instinct of the home and have found intolerable or praiseworthy the iron discipline which, without respect for "kings or cabbages," accords to each a subject's liberty to be born, to marry, and to die?

It will be the wise practice of each succeeding age, however, to follow the example of the enlightened Laureate who cared

for no poetry except his own. But albeit the proper subject of this essay, and meriting the serious treatment of a writer who can approach its presentation with authority, the poetry which the law is charged to provide against our needs to-day would rightly find itself a stranger in the company of the perverse parallels, the paradox and phrasing with which this essay has been charged. Yet if it be permitted to give a moment's forecast of how some aspects of this subject must eventually be treated, will not attention inevitably be centred on the recent and stupendous alteration of the established co-efficient of the transit of space? Not with the war, but with the coming of the age of steam, the poets of the law were faced, had they but known it, with the ruin of the world which they had made. "Divide and impose the law," said Cæsar. "Eliminate dis-" tance," sang the kettle, "that lustiness may disobey." How easy was the task which life entrusted to the lawmakers of old! Their jurisdiction lay within frontiers which at their bidding an army could secure. For Minos the very passage of Acheron itself was fenced with a grant of ferry and a skiff. But what frontiers, what previsions would avail to give protection against the host of invisible invaders to which our native citadels are now exposed? So long as the transmission of intelligence (always provocative of tumult) was slowed to the pace of human messengers, and must pass for the unlearned by word of mouth; so long as the vivid presentation of remote and enviable things had to abide the slow technique of painters, and each moment's thousand visible persuasions to discontent by right of contrast did not find the instant currency for their disastrous world travel upon the fixation of a flash of light; so long as travel withheld from all but princes the ostentation of a luxury aggressive in inverse ratio with probable desert—while those who took the road must face the hazards and hardships of the road and might reward the open hospitality of the road with travellers' tales; while the unknown, except as stuff for narrative, was terrible, life lay in the circle of the homestead, and its content did not pass the measure of what a day's journey brought to the door; while the generations patient and obedient lived the lives their fathers had found familiar since the Flood; what forces of rebellion need established usage apprehend? What force of combination or dispersal made active by what goad, should stir the lethargy of ancient use, and rouse the citizens in masses made insistent by communication of their wrongs to band themselves together in effectual resistance to the law? He has no poet's vision who would frame the laws upon the view that unrest and discontent are present in the passing phase of an afterthought of war. War was a conse-

quence as logical as futile of age-long discontent, rooted in causes which Law, unless it would suffer eclipse of poetry, must ascertain and remedy. Unless they are to start too late upon this "lustral task of pure ablution," the healing waters of the law must move apace. It is a condition of the bounties of electricity and steam that the spread of influences is extended over incredible remoteness and is attended with inconceivable reactions. If they are to overtake and check the extending cancer of the world's unrest, the forces of healing must set themselves an impetuous change of fashion, and cease to wear upon their course of seven-leagued wonder the honoured boots of the police. Not at the pace of armies, not with the diligence of Hannibal, but apposite as Portia, improvised as Ariel, let the waters "put a girdle round the earth." And those who ride with the white horses, and have the office as apparitors to bear the salutary sword, will find indeed that the dragons have been slain, but with their very slaughter have given life to an entrenched and more envenomed brood. In passing from status to contract, while stopping short upon the progress towards enfranchisement, with what a splendid gesture was the act of manumission made! And yet how less than little, unless by way of foretaste, was conferred! The bodies of the workers must be housed and healed at their own charges, while industry having destroyed the mobility of labour, met all appeals with the remorseless invitation to "move on." The rod no thicker than a man's thumb, no longer with its salutary fanning revived in all the fervour of devotion the fallible affections of English wives. Yet the enfranchised women, with souls and bodies run to fat unless trained on the pursuit of mischief, had, except on sufferance, no place of dignity by provision of the law in public or in private life. Under so excellent a system, where it was found that a citizen, through naughtiness of hunger, had been tormented to do wrong, the poetry of justice had made sufficient, if surprising, provision for his needs. A house of call most hospitably open proclaimed itself insistent for his entertainment without charge; and lest in the pride of life he should hear again the call of honesty and on a fresh adventure face a gambler's risks, the avenues so perilous to pass towards livelihood and self-support, with wise and sedulous providence were blocked, and the truant inmate entreated to resort to his appointed home. And thus in a succession dependent on the pleasure of the judge, the sentences of law took opportunity to link those golden chains which, across every thwarted nomad instinct of our race, should drag their train of living human sacrifice from the cradle (*malitia supplet ætatem*) to the grave.

It is of subjects such as these that, if he would wear the wreath, the future Laureate must sing. And in a world heart-weary for his singing, impatient with the course of falling water until Arion shall return and lead the streams (*carmine currentes ille tenebat aquas*), while Law alone may vaunt or grant such craft of Song, can those who follow Law mistake the call for leaders,—the call for his poor fluting from the least harmonious shepherd who has skill to play the pipe? Whether we be received as shepherds or as shearers, by right of the Profession which has most eminently learned that order must succeed to order and must suffer interruption from misrule, let us who, as stewards of the past, are heralds of the future, take without fear our place in the van of those who follow, singing our unchallengeable war song of patience, of fortitude, and of hope. By our experience of the slow processes through which the wisdom of the law elaborates the unwavering certainty of progress, let us be sheathed against the promptings of our own impatience, so that our hearts may be tutored for ourselves and others to maintain an equity of courage against the deceptions of hope deferred. Our Lady Themis has suffered no eclipse of vision. By her commission a laureate of stature sufficient for his office will yet infallibly be crowned. And when at his promptings the crooked has been made straight and Law once more is adequate to marshal Life; when the strife of class and the strife of sex has been composed, the chains of prisoners broken, and men have learned that the conditions of their welfare must be established on consent, not force; with the coming of a chivalry dismounted for the mean occasions of unhonoured daily life; on what venture may not Our Dreams ride forward to take possession of their inheritance to come? When the Pax Brittanica, which, with all its imperfection, is our glory and our pride, has yielded up the keys; when with the elder systems our noble laws have taken the inevitable road, joining the receding train of treasure along the way-worn highway "even from Persepolis to Mexico"; when from the East a later message has displaced the wisdom of which we were the priests; as we look backward for assurance, have we not warrant to affirm that every step (under the exercise of the old perspective or the new geometry) will witness an approach in the parallels of poetry and law? And so as dreamers who have authority to decree the meeting of non-convergent lines, to set order in the heavens, accord precedence through the Zodiac and bid the Archer accept the measure of the Scales; to what purpose shall we dedicate the magic wish which, with its mastery of things to come, is ours by royal privilege as the

appanage of dreams? As from some later lost Atlantis the poetry of the old law measures the stature of the poetry of the new, what grace or semblance in the vision will the veteran Wisdom most approve? Will law, having parted company with learning, have found the secret of an utterance which those who run may read, and on the happy chances of the Road, have gained assurance of the stranger's welcome accorded to those who win it, by wayfaring men? From the citadel of the affections of mankind will Discipline, once more a welcome guest, encourage Manners to resume the work of making man? Will class embattled against class, will woman against man, no longer set the barrier of armoured spiritual hatred to withstand the coming of the Age of Gold? With final capture of the pentecostal grace whereby the expectant peoples hear its mandates each in their own tongue, will Law have caught at last the saving hand of Poetry, and passed with its attendant liberty into the Mother Speech of bond and free?

ARBITRATION IN TRADE DISPUTES.

When a matter goes to arbitration, it is as a general rule taken for granted that the parties will fulfil the award of the arbitrator. If the unsuccessful party does not do so, there are ways and means of having the award enforced by the law Courts of the country. To this, however, there is one important exception, namely, in so-called arbitrations between employers and employed, but then only, as we shall see, *when the award is against the employees.*

In the case of a wages award, if the employer does not pay the wages awarded, he can very readily be made to pay by simply being sued for payment, and, on production in Court of the award, the rate of wages is vouched, and, other questions being absent, there is virtually no defence. Usually the employer is worth suing, and he quite properly obeys the award of the arbiter immediately and voluntarily; it is far otherwise in the case of employees. Assuming that the arbitrator announces a reduction of wages, the employees may refuse to honour the award by means of a strike. The employer cannot sue the union, which usually organises the strike: to sue each individual employee for damages for breach of contract would be a hopeless proceeding, and, even though it could be successfully worked out in Court, the remedy would be an empty one, as the employee, in eight cases out of ten, would not be worth suing.

That the above is, in plain language, the truth of the matter has, we think, been abundantly proved by experience.

It might well be thought that the circumstances of the war provided a unique occasion for the success of compulsory arbitration, but it was a failure, signal and complete. A great many unions at first acquiesced in arbitration, because, as long as prices continued to rise, advances of wages were more or less automatically awarded, so as to adjust wages to cost of living. When, however, the unions refused to go to arbitration, or, if they went, to comply with the award, it was impossible to make them. If 100,000 men cease work, it is impracticable to prosecute or fine all of them; to select a certain number soon raises cries of victimisation; those prosecuted are made martyrs, and funds are raised by their colleagues for payment of their fines.

Experience in Australia has been not dissimilar. In the year 1907 the results were summed up by Mr. E. J. Aves, who had been sent out by the British Government to report on the effect of Australian measures. Whilst in general his verdict was favourable, and some of his recommendations were adopted in this country, he suggested that the machinery might break down if put to the test of a falling labour market. As long, indeed, as Arbitration Courts awarded increasing wages and favoured shorter hours, they were not unpopular with the workers, and with satisfactory trade conditions all went relatively well. Even in those happy years, however, two things were perfectly clear. First, not even the wide sympathies of great Australian judges could secure the adoption of the most favourable judgments by the more militant unions. Secondly, where the will to peace was absent, no system of compulsory arbitration, no threats of penalties, could prevent strikes by large bodies of workmen.

The present machinery for industrial arbitration is, apart from the Whitley Councils, which are only voluntary conciliation boards, contained in the Industrial Courts Act, 1919 (which for practical purposes embodies the Conciliation Act, 1896). It defines the Government's powers of intervention in industrial disputes, such intervention being necessary in cases where the joint machinery is not adequate, or where the joint machinery has failed to effect a settlement. The Act sets up a permanent Court of Arbitration, to which recourse can be had by parties to industrial disputes if both parties to the dispute consent. Although permanent provision for voluntary arbitration is thus made by the establishment of the Industrial Court, it has been the policy of the Ministry of Labour that trade disputes should be settled as far as possible by negotiation between employers' associa-

tions and trade unions. When this fails, or a joint industrial council or a conciliation board cannot arrive at an agreement, the Industrial Court is an independent authoritative tribunal to which such differences can be referred.

Should the parties so desire, a dispute can be referred by the Minister of Labour under the Act either to a single arbitrator appointed by him or to a special board of arbitration composed of members selected by the parties from panels of persons appointed by him to act on these boards. Reference to the Industrial Court is, however, the normal procedure. A dispute may be referred for settlement under the Industrial Courts Act only after the exhaustion of all available means for conciliation already existing in the trade. Under the Industrial Courts Act, the Minister has power to establish a Court of Inquiry to investigate the causes and circumstances of any industrial dispute, whether the dispute exists or is merely apprehended; moreover, to this course the consent of the parties is not required. These Courts have no power to settle the dispute by arbitration, but are restricted to making a report, which serves to put before the public an impartial account of the merits of the case, with possibly a recommendation as to the best course to be pursued to effect a settlement.

Before the Industrial Court has any jurisdiction to issue a decision, the parties must agree to submit their case to it. Therefore, though dignified by the name of a Court, and created by a special statute, the Industrial Court is nothing but an ordinary arbitration reference.

But, assuming parties agree to submit their case to it and judgment is given thereon, has the Industrial Court any greater power than an ordinary arbitrator might have? This question has been very acutely raised by the recent dispute in the typographical trade. There was a strike in consequence of an attempt by the employers to reduce wages. At length, after long negotiations, the question was referred by both parties to the Industrial Court, which in due course issued an award in the employers' favour. This award the Typographical Association, in accordance with its rules, submitted to a ballot vote of its members; for the rules provide that no settlement may be accepted until it has been ratified by a general vote. The members rejected the award, and were thereupon called out on strike by their association wherever the employers attempted to give effect to the reduction which the Court had decreed. The strike thus became an act, not of ordinary opposition to a cut in wages, but of resistance to the decision of a Court duly established by the Government.

What could the Industrial Court do in these circumstances? Nothing. The *New Statesman* thus deals with the Court—"The Industrial Courts Act was passed at the end of 1919, "practically with the consent of the trade unions, which were "consulted in the preliminary negotiations. As it reached "the statute book it differed in certain very material respects "from the measure first proposed by the Government. The "trade unions insisted that every phrase suggesting the insti- "tution of a system of compulsory arbitration—which was "clearly implicit in the original draft—should be struck out. "They agreed to the establishment of the Industrial Court as "an arbitrational body, but they insisted, not only that re- "course to it should be voluntary, but also that there should "be no sanction of law behind its awards. The Court was "thus created, with power to make an award in any dispute "referred to it, but without authority to enforce its award "by any process of law. The printers, therefore, in refusing "to abide by the award of the Industrial Court, were strictly "within their legal rights. What is important is that the "Industrial Court clearly was not given in 1919, and does not "possess to-day, the right to dictate to employers or workers "the terms on which they shall give or accept employment. "It can pronounce its awards; but the acceptance or rejection "of those awards is at the discretion of the parties concerned."

We seem to have here a further proof of the futility of State intervention in the present circumstances. As already explained, it being impracticable to penalise workmen, even though the employer is always available when the award goes against him, the proper method, in our opinion, is to take either of two courses—(1) disallow collective bargaining, and leave the matter of wages regulation entirely to the operation of the law of supply and demand, or (2) to make the funds of unions liable for breach of award. In the case of the Typographical Association, for instance, there should not be the least hesitation in subjecting a union which agreed to go before the Industrial Court to some penalty in the event of its members flouting the decision. We are not sanguine that either course will be followed.

THE PLEADER.

The important question discussed in *Cantiere San Rocco, S.A. (Shipbuilding Company)* v. *Clyde Shipbuilding and Engineering Company, Limited*, 1922, S.L.T. 479, will likely go to the House of Lords, we shall just note here the position taken up by the majority and minority judges in the Court of Session. Stated abstractly the point was this—in the event of

a contract being entered into and on its execution an instalment of the contract price paid to account as stipulated in the contract, and thereafter the contract becoming impossible of performance, what are the rights of parties in regard to the instalment paid? The majority of the First Division have adopted the view taken by Lord Justice Romer in *Chandler* v. *Webster*, 1904, 1 K.B. 493, where he stated the law in general terms—" Where there is an agreement " which is based on the assumption by both parties that a " certain event will in the future take place, and that event " is the foundation of the contract, and, through no default by " either party and owing to circumstances which were not in " the contemplation of the parties when the agreement was " made, it happens that, before the time fixed for that event, " it is ascertained that it cannot take place, the parties thence- " forth are both free from any subsequent obligation cast upon " them by the agreement; but, except in cases where the con- " tract can be treated as rescinded *ab initio*, any payment pre- " viously made, and any legal right previously accrued accord- " ing to the terms of the agreement, will not be disturbed." The dissenting judge, Lord Mackenzie, whom with the Lord Ordinary agreed, followed the opinion of Lord President Inglis in *Watson & Co.* v. *Shankland*, 1871, 10 M. 142, at p. 152, affd. 11 M. (H.L.) 51 -" There is no rule of the civil law, " as adopted into all modern municipal codes and systems, " better understood than this—that if money is advanced by " one party to a mutual contract, on the condition and stipula- " tion that something shall be afterwards paid or performed " by the other party, and the latter party fails in performing " his part of the contract, the former is entitled to repayment " of his advance, on the ground of failure of consideration. " In the Roman system the demand for repayment took the " form of a *condictio causa data causa non secuta*, or a *condictio* " *sine causa*, or a *condictio indebiti* according to the particular " circumstances. In our own practice these remedies are " represented by the action of restitution and the action of " repetition. And in all systems of jurisprudence there must " be similar remedies, for the rule which they are intended to " enforce is of universal application in mutual contracts." There is thus disclosed a difference on a point of law of great importance, the solution of which is not easy, and the final decision will be awaited with interest.

An interesting point of bankruptcy practice came before Mr. Justice Astbury, and eventually the Court of Appeal, *in re Keene*, 38 T.L.R. 663, C.A. Here a bankrupt had refused

to disclose to his trustee in bankruptcy the secret unwritten *formulæ* for articles which he had manufactured in his business. He contended that such *formulæ* are a part of his personal skill or knowledge, and that this is not part of the property which under the Bankruptcy Acts is transferred to his creditors; there were other objections to the disclosure, but this was the only one raising a question of principle in bankruptcy practice. The trustee, in fact, wanted the *formulæ* because with their possession he could sell the business; without them he could not obtain an offer for the assets as a going concern. The Court of Appeal decided the matter on a very simple ground. Suppose the *formulæ*, although a secret, had been reduced to writing, it is well settled that such a document is part of the property divisible among the creditors. To write down the *formulæ* involves no personal skill; it is precisely analogous to the signature of documents necessary to assign property. Therefore the bankrupt can be ordered by the Court to write down the secret *formulæ* in order that a written document containing them can be included among his business assets.

A writer in the *Solicitors' Journal* draws attention to the case of *Rex* v. *John Armstrong*, *Times*, 10th inst., as furnishing one of the very rare instances in which the Court of Criminal Appeal quashed a verdict virtually on the merits. Usually the decisions in that Court are given on points of procedure, just as occurs in the High Court of Justiciary in appeal by stated case or suspension under our own procedure. In the case mentioned a dissenting member of the Court was in favour of affirming the conviction. But separate judgments are not permitted in this Court, unless the bench resolves otherwise for some special reason, so that the grounds on which one of the three judges—the Lord Chief Justice, Mr. Justice Shearman, and Mr. Justice Avory—differed from his learned brethren are not known. Here two prisoners, jointly indicted for larceny at Cardiff City Sessions, had been both convicted. The charge was that of stealing and receiving a suit case which contained some jewellery, and also a piece of soap and a shaving brush. Some days afterwards the two prisoners were together in a public-house when one of them attempted to sell some of the stolen jewellery. He was arrested and searched; so was his companion, and the latter was found to be in possession of the piece of soap and the shaving brush, while the first prisoner had the jewellery. Both men stated that the second prisoner knew nothing about the theft, and that the first prisoner had made him a present of the soap and brush. Now the doctrine of "recent possession," as is well known, is to the effect that

any person found in "recent possession" of property which has been stolen is presumed to be guilty either of stealing or of receiving it unless and until he gives some *prima facie* reasonable explanation of his possession. The explanation given by the second prisoner was clearly a reasonable account of how he might have come to possess the stolen soap and brush; this rebutted the presumption of guilt. That being so, no sufficient evidence to connect him with the crime remained, and the Court felt that it ought not to affirm a conviction which might possibly be erroneous merely because the jury, with whom the responsibility rested, had been quite properly directed as to the law by the trial judge.

Though both the learned Sheriffs were agreed in holding the case of *Bisset* v. *Scatterty*, 1922, S.L.T. 95, as irrelevant, we respectfully think there is considerable room for dissent from their opinions. In saying so we do not assert that these opinions do not contain a reasonably possible solution of the question at issue. A hotel servant after hours took a car out of the hotel garage and delivered a parcel to one of the hotel customers. On the road he injured the pursuer; the question is, was he acting within scope of his employment so as to infer liability against his master. No doubt as the judges emphasised, he was acting without his master's permission, but we find it hard to agree that he was not, regarded from the point of view of a member of the public such as the pursuer, acting within the ostensible scope of his employment.

Obituary.

At Perth, on 18th September, after an illness extending close on a month, Mr. John Begg, town-clerk, Perth. Mr. Begg, who was in his sixty-fourth year, was a native of Rutherglen, and after qualifying as a law agent received an appointment with the firm of Skeete, Chalmers & King, solicitors, Perth. Towards the end of 1896 he was appointed depute town-clerk, and in October, 1899, on the death of Mr. William Macleish, was elected to the principal office, which he filled up to the time of his death. Mr. Begg is survived by a wife and two daughters.

Notes from Edinburgh.

Parliament House, *30th September*, 1922.

On Tuesday, 17th October, the Court of Session will resume operations for the winter session, and, even at this date, with the start so near at hand, it is not known

definitely who is going to be the occupant of the chair of the Lord Justice-Clerk in the Second Division, though it is true the belief is generally entertained that Mr. Munro has already received the appointment. There are several straws whose bending indicates the direction in which the wind has been blowing recently, and there are numerous experienced readers of auguries here whose judgment can be relied on, and few of them have any doubt on the matter—the Secretary for Scotland is going to have a successor in office very shortly. Assuming it to be correct that Mr. Munro will take over the command of the Second Division, he will be in age as well as regards years of admission to the Faculty, the junior to the three judges who will sit under him. Lord Ormidale was admitted to the Faculty in 1878, and his age is sixty-eight; Lord Hunter and Lord Anderson were both admitted advocates in 1889; the former is fifty-seven and the latter is sixty; and Mr. Munro's admission was in the year 1893, his age being now fifty-four. We can find examples of judges junior in age and as regards admission as pleaders who have been placed over the heads of others very much their elders, Lord President Robertson's case being one, and that of the present Lord Chancellor another. Mr. Munro's claims for preferment are certainly stronger than those of the present Lord Advocate, for the latter has held office for but a brief spell, while the former has had quite a long official career as Lord Advocate and Secretary for Scotland, and with the example of Lord Dunedin to follow, the appointment of a Secretary for Scotland to one of the chairs of the Court of Session seems a likely thing to happen. The English newspapers have regarded Sir Robert Horne as being an aspirant for the appointment, and that the question was merely one whether he or Mr. Munro would be preferred. With a Budget in preparation, and with world-wide financial problems to perplex him, it would not seem at all likely that the Chancellor of the Exchequer would for a moment have contemplated quitting his post of duty just now, no matter how strong the temptation might be to come back to his original element, the profession of law, and in the rôle of a judge. In comparison with his almost Imperial functions, to occupy a chair in the Court of Session would appear to be but a parochial distinction.

The appointment by the Secretary for Scotland of a Committee to inquire as to the position of messengers-at-arms and sheriff officers is a step which comes very late in the day,

for the statute which brought disaster to once lucrative callings is now exactly forty years old, that being the Citation Amendment Act of 1882. To-day there is some scope for the exercise of the sheriff-officer's functions, but the marked scarcity of messengers-at-arms throughout the country is testimony to the far-reaching effects of the Citation Amendment Act, and Lord Dunedin when Lord President had occasion to notice the dwindling number of messengers-at-arms when dealing with one of the many petitions presented for authority for diligence to be executed by sheriff-officers in a region where messengers were unknown. The dwindling was correctly ascribed by his lordship to the operation of the Citation Amendment Act, and it is manifest that there is nothing now existing to encourage individuals to take up the calling of messenger-at-arms if a livelihood is to be earned by that calling alone. Since 1882 agents have been taking full advantage of the right conferred to serve writs and citations in both supreme and inferior Courts, and, while personal services by messengers in consistorial causes do annually run to a fairly good number, the actual profit is small, for the majority of services are on behalf of parties on the poor's roll. The execution of diligence still remains in the hands of messengers and sheriff-officers, and the latter are assured of work which in the lower Courts is of immensely greater volume than is experienced in the Court of Session. Large tracts in Scotland are now without the services of messengers-at-arms, while yet sufficiently supplied with sheriff-officers, and the provision of sec. 19 of the Court of Session Act, 1868, has since 1882 had little practical value, for that provision is confined to services of Court of Session writs which in the majority of cases are done by agents by registered post, and the sheriff-officers who, but for the 1882 Act would have been instructed to act in the absence of messengers-at-arms are only resorted to for diligence following on authority specially granted by one or other of the two Divisions of the Inner House. Everybody's business being nobody's business, the almost useless sec. 19 of the 1868 Act has for forty years been allowed to remain without the common-sense amendment having been made, viz., the extension of the section so as to include the execution of diligence. During forty years the number of petitions to the Inner House for warrant to sheriff-officers to execute diligence on Court of Session decrees must have been very considerable, and it is only within the last twelve years that such petitions were allowed to be lodged in manuscript form. The fact that the Legislature has allowed service of Court of

Session writs and citations by sheriff-officers where no messengers-at-arms are available, and the further fact that the Inner House as matter of course grants warrant for diligence being done on Court of Session decrees in similar circumstances, clearly point to there being no real distinction existing between the two classes as regards qualifications; and whatever results may follow from the inquiry by the Committee sitting under the able leadership of Lord Ashmore there seems small reason to doubt that, if specially appointed officers are still to be entrusted with the execution of diligence and personal services in all Courts, there will be one class, and one class only, of such officers.

Some important matters are to come before the forthcoming annual meeting of the Incorporated Society of Law Agents, notably the subject of remuneration of agents for the poor and the question of a suitable and economical substitute for printing being allowed in the Supreme Courts. It is understood that in the report of the Council, which is to be submitted to the meeting, it is to be suggested that when fees and outlays of agents for the poor in litigations are not recovered from the other side, the same should be paid by the parish council of the client's domicile, and that in criminal cases the poor prisoner's agent should receive a grant from H.M. Exchequer. The Council report points out a hardship specially felt in small country towns which is due to the fact that the number of local practitioners is small and there is consequently no relief from the burden of representing pauper litigants in the Sheriff Courts, a burden which is not felt in towns and cities with a large number of agents available to provide for a fair rotation. In regard to the matter of fair rotation, it might be thought that in the Supreme Courts the fresh supplies of new members to both bodies, the W.S. and S.S.C. Societies (which respectively provide two agents annually to represent poor litigants) would be sufficient to make a change possible yearly without any difficulty, but this cannot be so when it is found that sometimes poor agents have had several years' continuous duty, and in two cases recently, without war conditions being responsible, quite lengthy spells of duty fell to the lot of agents for the poor. As regards the Court of Session, there is no good reason existing for confining the appointment of agents for the poor to members of the two societies. The ordinary solicitor practising in the Supreme Courts should be made available, and all that is required is an Act of Sederunt passed by the Court to provide

simple machinery for making the field of selection wider than it now is.

The subject of printing has already been carefully considered by the judges of the Court of Session, and as no Act of Sederunt has resulted from their deliberations, it seems unlikely that the Incorporated Society of Law Agents will be able to find arguments which have not been laid before the Court, unless, perhaps, it can be demonstrated beyond question that printing is the main weapon now in use to kill litigation. If that can be demonstrated, then the charge of self-destruction can be brought home to those responsible for that weapon having been allowed to remain in use. It should not be overlooked, however, that obstacles do stand in the way of a general dispensation with printing being allowed by any Act of Sederunt, and among them may be mentioned the circumstance that, in addition to the members of the appellate bench and the counsel and agents concerned, copies of papers are also required by the several law reporters and by the libraries which annually bind up sets of session papers, references to which last are frequently essential.

The Chair of Public Law in Edinburgh University is one of considerable antiquity, having been founded so long ago as 1707, the patronage being vested in the Crown. Since 1890 Professor Sir Ludovic J. Grant has been the popular and distinguished occupier of the chair, and after a spell of thirty-two years of duty he recently resigned. His successor has been found in the person of Mr. William Wilson, advocate, who was admitted to the Faculty in 1910, his practice having been interrupted by war service, and since the cessation of hostilities he has held the appointment of secretary to the University. In his short career as a counsel Mr. Wilson impressed one as being a capable pleader and fluent speaker with an attractive style, and students of his class will find the subject of Public Law presented in an agreeable, lucid, and instructive manner.

The new summonses called in Court on the second box-day in vacation, 21st instant, amount to 85, and of these there are 23 consistorial causes, being 22 divorces and 1 declarator of marriage. Lord Ashmore heads the list with 39, and 9 are divorces, with the 1 declarator of marriage mentioned; Lord Sands comes next with 25, whereof 8 are divorces; Lord Morison has 19, and 5 of them are divorces Lord Constable has 5 and Lord Blackburn has 3, with no consistorial causes among them. As the increased Court dues, which for the future are to be exigible, will come into force on 1st October,

and will adversely affect litigation, it is too much to hope for an improvement on the next calling lists, which will come out on 17th October.

Notes from London.

The Temple, 30*th September*, 1922.

The long vacation draws to an end, though that end is not yet; the familiar figures again appear in the ways and byways of the Temple. Consultations and conferences are being held in the chambers of leading counsel; in a word, the whole machinery of the law is setting to work again for another year of effort and struggle, of mingled success and failure. The old question is being asked anew, is not the long vacation too long? Last year there was such a pressure of business that the judges abbreviated it of their own accord; they sat to take non-jury cases in the first days of October, whilst as yet, in name at any rate, the legal term had not begun. The experiment was successful, the lists were lightened, and there was no undue pressure on the judicial machine; but it is not repeated this year. Perhaps their lordships wish it to be understood that their efforts of last October must be considered as a favour or free gift not to be dulled by monotonous repetition, and then there is not quite the same need for it on this occasion. Although the King's Bench arrears are considerable, they are not portentous. In the Divorce Court the accumulation is enormous, but we have come to look on that as quite in the ordinary course of things; yet when all is said and done a moderate reform in the way of shortening the long vacation would be popular both with the public and the general body of the legal profession. Thus the 1st of October seems a very convenient date; that would leave August and September for rest and recreation. The additional fortnight it would add to the legal year would render the appointment of an additional judge or judges unnecessary. This would be a saving to the public at a time when economy is of the greatest moment. This long vacation has been much like its predecessors; there is either less work in existence, or those in power are increasingly vigilant to prevent any but necessary business being taken; the Vacation Court that sits every Wednesday has a more and more restricted list, usually only some ten or twelve cases come before it. Twenty years ago there was about three times that number. Obviously if the vacation be shortened,

the exclusion of anything but strictly necessary business from the Vacation Courts is more and more justifiable.

Two prosecutions for perjury at the Central Criminal Court this month have called attention to the prevalence of this crime in the proceedings of that tribunal. A man was charged and found guilty of denying he had condoned his wife's adultery when it was plain he had done so. Judge Atherley Jones inflicted the mild punishment of a month's imprisonment in the second division, and rather cynically despaired in doing so of making an end of perjury in the Courts. The other case before the Common Serjeant was a stranger, though not improbably a frequent, form of offence if the truth of such things were known. A man anxious to assist his wife to get a divorce, and having obtained the aid of an obliging female friend, pretended to have committed adultery when in fact he had done nothing of the kind. For this he received four months, which seems a very proper punishment, though various would-be reformers of our marriage laws have protested and agitated against the sentence. As the man had plainly procured the commission of perjury and grossly deceived the Court, it is hard to see why he should not be punished. The English divorce law is a mass of inconsistencies, the result of compromises between opposite systems, and that probably has given rise to the idea that perjury in a Divorce Court is nothing like so bad as perjury anywhere else; nay, some have held that to lie in defence of a woman's honour is here the first duty of a gentleman. There is only one way to dispel this delusion, and that is by prosecution of every serious case. It was by some such course that the practice of duelling was stamped out in England, and wonders would be effected in the Divorce Court if the method was strictly applied. The King's Proctor, who acts as a killjoy to the hopes of many couples desirous of freedom, does something in this direction, but his efforts need to be supplemented by the strong arm of the criminal law. Divorce cases excite great interest among the scandal-loving section of the community, so that newspapers of a certain type find here pages of comparatively cheap and yet attractive copy; to the lawyer nothing is usually duller than the Divorce Court, it is a monotonous chronicle of weakness, folly, and stupidity without the varied interest of a civil action or the sombre dignity of a great criminal trial.

The annual meeting of the Law Society was held this year at Leeds during the last days of this month, when a number of interesting current legal topics were fitly discussed under the guidance of experts. The Law of Property Act, 1922, was,

of course, touched on, but in rather a gingerly fashion, for solicitors have scarcely yet made up their minds how either the public or themselves are to be affected by this enormous change in our law. Contempt of court was considered in its various bearings, but there does not seem much room for improvement. The great authority on the subject is still the thoroughly executed text-book of the late Mr. Oswald, Q.C. When it first appeared the profession received it with some amusement. Mr. Oswald, a kindly and estimable man in private life, was continually at war in open Court with the judges, and could not be said to be a favourite with any of them. He had by no means always the best of the word-play. Once in arguing before the late Mr. Justice Chitty in a case about some personal property, he observed, "My lord, I shall "now address myself to the furniture." "Ah, Mr. Oswald," said the learned and witty judge, "you have been doing that "for the last hour." The neatness of the retort was perfect, and the eminent Q.C. needs must resume his seat!

Another thorny subject discussed at Leeds was the Rent Restriction Act, which fell to the competent hands of Sir Kingsley Wood, M.P. Few measures have produced such diversity of opinion. It has been remarked on the evidence which the Commission on the Act has been taking that it is not of much value, because the tenant witnesses all say one thing, and all the landlord witnesses the exact opposite. There is a touch of the comic about this, although it is only human nature, as their interests are supposed to be diametrically opposite. Almost every Court has given confusing and perplexing decisions on this piece of legislative wisdom, and only in one thing have they concurred: it is one of the most obscure, perplexed, and confused Acts on the statute book. The ears of the unknown draftsman must often have tingled if he has cared to follow the fate of his labours in the law Courts, but perhaps after all he is not much to blame. A high judicial authority has set forth in graphic language the progress of a contested bill through the Committee stage in Parliament. It enters that stage as a young lady, comely in appearance and neatly and appropriately dressed, might be supposed to enter a park in which all unknown to her there lurks a savage bull; the animal chases the fair unfortunate over bush and brake, till at last she narrowly escapes by forcing her way through a quickset hedge. What a dishevelled appearance she now presents! In such a woe-begone state is the contested bill when buffeted by friends and foes it emerges from Committee! It has been suggested that it ought then

to be returned to the draftsmen to be again put into proper shape. Unfortunately, the draftsman has not the power of Parliament; the measure would require to go through Committee again, so that the alterations might receive legislative sanction and the whole process would inevitably be repeated. Of course, some bills are much better drafted than others; for instance, the Act which did away with the curious old formal actions of recoveries by which entails were formerly broken by putting in their place a simple deed of enrolment has always been considered a model of its kind, but it was obviously not a measure to arouse conflicting interests. It was a mere legal change carried through in times of peace and plenty, but the Rent Restriction Acts were professedly temporary measures passed under the excitement and abnormal conditions of a great conflict. Unfortunately, though inevitably, a number of people, and those of the poorer class, are supposed to be interested in maintaining those Acts very much as they are, though the great war is some years over. It is proposed to retain this legislation on the statute book, nay, even to make it permanent. The landlords urge the injustice to them of such a course of proceeding. This is not the place to discuss at length the pros and cons of the measure. Two things are tolerably certain—the Acts will not at once be repealed altogether, but extended for one or possibly two years longer; they will not be made permanent.

It is to the credit of solicitors that in their annual meetings they are more concerned with subjects such as we have mentioned of wide interest than with petty details of their own special professional difficulties. Although they have, as it is to the public interest that they should have, certain privileges, yet they exercise their calling under considerable restrictions, imposed no doubt also in the public interest. Albeit it took place some months ago, the curious case of H.M. Isles, which was an appeal from the Supreme Court of Trinidad, may be noted in this connection. The appellant was a solicitor of twenty years' standing; fifteen years ago he had altered the date of a deed in order to escape paying a stamping penalty of 15s. It was not suggested that the change of date had any other hurtful effect, and he gave a plausible explanation, which, however, was not accepted by his judges. The matter coming in some way or other to light after all these years, the Court at Trinidad thought it necessary to strike him off the rolls, and this decision the Privy Council affirmed. "There must be no small dis-'honesties in a solicitor's business," said Lord Sumner, who

delivered the judgment of the Court. He further pointed out that the local tribunal must have a much better knowledge of the circumstances than it was possible for their lordships to attain, so that on this ground also the decision could not be interfered with. On the other hand, solicitors are peculiarly exposed to some species of frauds. At the Old Bailey this month the case of *R.* v. *Kirby & Hopkins* illustrated this. The prisoners, originally of good position and well to do, had pretended that one of them still possessed a house at Lyme Regis, though it had been disposed of some time ago. They instructed a solicitor to sell this house, and so procured an advance from him, which, of course, he will never see again, though the prisoners were convicted and suitably punished.

A word may be said in closing as to two lawyers whose deaths are recorded this month. Mr. W. F. Hamilton, K.C., died at Buenos Ayres, where he was attending an International Law Congress, and Sir Francis Gore Brown was a victim of an almost inexplicable accident in his country house at home. Both were high authorities on company law, each enjoyed a large practice, and was the author of well-known text-books on his own special subjects.

Appointments, Business Changes, &c.

Messengers-at-Arms and Sheriff Officers.—The Secretary for Scotland has appointed a Departmental Committee "to inquire into and report upon the existing law and practice in regard to the functions and duties of messengers-at-arms and sheriff officers in Scotland, and the present methods of and facilities for the service, execution, and carrying out of legal progress or diligence by such officials, and as to what changes, if any, are necessary or expedient in regard thereto."

The members of the Committee are as follow:—The Hon. Lord Ashmore (chairman), Mr. John L. Wark, K.C., Sheriff of Argyll; Mr. A. Gray Muir, W.S.; Mr. W. J. Lewis, S.S.C.; Mr. A. Millar Bannatyne. Mr. Henry Crow, of the Scottish Office, will act as secretary to the Committee.

Edinburgh.—Mr. W. H. Hamilton, S.S.C., has been appointed private clerk to Lord Ormidale.

Glasgow.—The Juridical Society commences its seventy-first session on 3rd November, when the opening address will be given by the Right Hon. Lord Justice Younger. The meeting will be held in the hall of the Merchants' House, 7 West George Street, at 7.30 p.m.

THE

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JUDICIAL REFORM AND ECONOMY.

THE subject of judicial reform in Scotland was sharply raised by the Geddes Report. In the House of Commons a member later asked whether, as regards Scotland, the Government proposed to take any action upon the suggestions of the Geddes Committee, and he received from the Secretary for Scotland a rather curt reply that, in 1870, reform proposals had been fully reported on by a Royal Commission, and that since then *no change of circumstances had occurred* calling for further inquiry. But this is emphatically not so, for, since 1870, no fewer than seven Sheriff Court Acts have been passed, culminating in the Consolidation Act of 1907, amended by the Act of 1913, which now forms the Sheriff Court Code in Scotland, and the result of that legislation is that present-day circumstances have no likeness whatever to the circumstances of 1870.

The demand for a new Commission to consider the question in the light of the present-day circumstances is growing in intensity, and has been dealt with by the influential press in Scotland. In the *Glasgow Herald* of 25th April last a carefully-thought-out article appeared, in which a specific scheme was set forth, the adoption of which the writer claimed might effect a saving in the cost of the Scottish judiciary of, roughly, £50,000 a year, the general grounds of the proposal being that the Scottish judicial system should be assimilated to that of England and of other countries, by having (1) a Court of first instance of universal civil jurisdiction; (2) a Court of Appeal; and (3) a Supreme Court of final appeal. The writer boldly suggested (1) the abolition of the office of Sheriff-Principal; (2) the abolition of the Lord Ordinary as a judge of first instance; (3) the Sheriff in his district to be the judge of first instance in all civil causes; (4) the Court of Session to become a Court of Appeal only sitting in three Divisions, with three judges in each; and (5) the final appeal to be to the House of Lords.

To the conservative legal mind these proposals may probably sound revolutionary, but the question is not whether a scheme of reform is revolutionary, but whether it is practical, and it is somewhat significant that in the Edinburgh Letter of the Scottish Law Review of May the writer, commenting upon the *Herald* article, said, "While, from a Court of Session point "of view, the suggestions seem very revolutionary, they are "none the less well worthy of consideration." It is a curious coincidence also that, on the very day the article suggesting reform appeared in the *Glasgow Herald*, an article on the same lines appeared also in the *Aberdeen Free Press*, and the subject has received a good deal of attention in the correspondence columns of the Scottish press. If substantial economy is to be effected, obviously the revision of the existing system must be a root-and-branch revision. Tinkering with it will lead nowhere. The Government will doubtless yet be pressed to appoint a Commission, and, in view of this probability, we propose to discuss the situation, or, rather, we should say, to endeavour to lay before our readers what the present situation is, for we do not here intend to champion any set reform scheme. But what we do support most heartily is the demand that a Commission should be appointed to inquire and to report whether, without sacrifice of efficiency, money can be saved upon the cost of the Scottish judiciary. Our readers, both as lawyers and as taxpayers, have an obvious interest in the subject.

I. The Office of Sheriff.

One of the witnesses before the 1870 Commission—the late Sheriff Dickson, of Glasgow—laid down two axioms with regard to Courts of Appeal which can hardly be disputed, namely, "(1) that they should be, in a decided and marked "manner, superior to the Courts whose judgments they review; "and (2) that they should be so constituted as to secure uniform "and authoritative exposition of the law." It is pointed out that obviously an appeal from a single judge—the Sheriff-Substitute—to some one of the fifteen other single judges—the Sheriff—does not attain this object. Fifteen views are possible of the same point of law, for the Sheriff who decides it can do so only for his own jurisdiction. His judgment does not apply in the neighbouring sheriffdom. It is suggested that it is a judicial anachronism, prevailing in Scotland alone of all countries, that, between the judge of first instance and an appeal tribunal composed of several judges, there should be interposed an appeal to a single judge—in the person of the Sheriff. It is a very practical question whether the removal

of this anomaly, with its concomitant cost of not less than about £12,000 a year, is not long overdue.

Before the 1870 Commission much was made of the advantage of a cheap and speedy appeal, more especially in cases of no great money value, to the Sheriff, who, as a practising advocate, was presumed to have a wider knowledge of the law than a Sheriff-Substitute. But the Sheriff-Substitute of to-day is not, as he was then, the nominee of the Sheriff. He is now an independent judge, nominated by the Crown, and he is drawn from the same ranks as the Sheriff. The old requirement, even for a Sheriff, that he must be a practising member of the Edinburgh bar, no longer exists. The only statutory requirement now is that he shall be "an advocate of five years' "standing, at least, or if not an advocate a Sheriff-Substitute "of five years' standing at least." The qualification for a Sheriff-Substitute is that he shall be "an advocate, or a law "agent within the meaning of the Law Agents (Scotland) Act, "1873, of not less than five years' standing in his profession." A remark of Sheriff Dickson, in his evidence before the 1870 Commission, it is urged, has much greater force even now than it had then,—"Considering that frequently the Sheriff-Prin-"cipal is appointed on merely political considerations, it may "well be doubted whether, on the average, the Sheriffs who sit "on appeal are superior in legal attainments to the Substitutes. "In some cases no doubt they are, but among the accidents of "political patronage it must not infrequently happen that the "Substitute is the better trained and more experienced lawyer "of the two. Even where it is otherwise, the difference between "them cannot be so great that, as a rule, the judgment of the "Principal is decidedly superior to that of the Substitute."

The best evidence of whether it is now so regarded or not is perhaps that of the litigants themselves. In the Report of the 1870 Commission it appeared that 40 to 50 per cent. of cases decided by the Sheriff-Substitute were appealed to the Sheriff, but the figures in the last issued judicial statistics (for the year 1920) indicate a decided change of view amongst litigants, for it appears that in that year the 42 Sheriffs-Substitute in Scotland pronounced in their ordinary Courts 6144 judgments in civil causes over £50 in value. Of these, only 517 (under 1 per cent.) were appealed to the Sheriff. Of the 517 so appealed, the judgment of the Sheriff-Substitute was confirmed by the Sheriff in 387 cases, and reversed or varied in only 130—that is to say, the Sheriff-Substitute's judgment was altered in only about 2 per cent. of the appealed cases. The expense of a further appeal to the Court of Session is so

great, that very few cases go further. In 24 cases only was the Sheriff's judgment carried further to the Court of Session. The statistics do not reveal in what proportion of these the Sheriff-Substitute's judgment was restored, but it is said that such a result is by no means uncommon, and that it is probably not an overestimate to assume that, if the whole 130 cases, in which the Sheriff reversed the Sheriff-Substitute's judgment, had been carried to the Court of Session, the Sheriff-Substitute's judgment would have stood in at least half of them. And so the present practical question for the taxpayer is whether the cost of maintaining the office of Sheriff-Principal, as an appeal single judge, is warranted by the results.

It is pointed out as a somewhat significant circumstance that, of recent years, when statutory duties, many of them very important,—more especially those of a communal kind, which very closely touch the social and industrial life of the community,—are entrusted to the Sheriff Courts, it is not uncommon to insert in the statute an express provision that the judgment of the Sheriff-Substitute shall be final; which appears to suggest that the Legislature itself has come to recognise the futility of an appeal from a single judge to another single judge.

It is true, no doubt, that the Sheriff in Scotland is an administrative as well as a judicial officer, and there was a time perhaps when his administrative duties were important; but it is pointed out that the modern development of municipal institutions and the growth of Government departments in direct touch with the municipalities tend to make the administrative work of the Sheriff now somewhat visionary; and that, such as it is, it is even now to a large extent, in districts where the Sheriff is non-resident, mostly done by the local Sheriff-Substitute, for in Scottish statutes, with very few exceptions, the expression "Sheriff" includes "Sheriff-Substitute."

It rather appears, therefore, that the Geddes Committee were doing something more than merely drawing a bow at a venture when they pointed out that one obvious road to economy in Scotland lay in the reduction of her judicial staff, and when they recommended immediate consideration of the question whether the Sheriff-Principal, at any rate, had not served his day, and whether the cost of maintaining his office might not now be saved to the nation, without impairing the efficiency of the Scottish judicial system.

II. Office of Lord Ordinary.

If the proposition be entertained that the appropriate judicial system in any country is (1) a judge of first instance;

(2) an appellate Court; and (3) a supreme Court of Appeal; then the question at once arises whether it is any longer necessary to maintain the office of Lord Ordinary as a judge of first instance in civil causes in Scotland, at a cost to the nation of about £20,000 a year. It is not necessary, of course, to maintain *any* judicial office if the duties of that office can be as efficiently performed at less cost by other existing judicial officers. That only other existing official is the Sheriff-Substitute, who is the only other judge of first instance in Scotland in civil causes. A litigant in Scotland has always had the choice of bringing his suit either in the Court of Session or in the Sheriff Court. But until recently the jurisdiction of the Sheriff Court was hampered by restrictions, and some forms of action could only be brought before a Lord Ordinary. It was a fairly common practice also all over Scotland for cases of importance or involving large sums to be brought before the Lord Ordinary. This was the situation when the 1870 Commission reported, but would-be reformers point out that the situation now is very different, for the Sheriff Court has become the popular Court of the people, and its jurisdiction as a Court of first instance has now been so extended as practically to be almost co-equal with that of the Court of Session. It is said that the matter of the sum involved is no longer a factor in the choice of the judge of first instance, and that there is not now any element of personal superiority of judges, because it is now universally conceded that the Sheriff Court is excellently staffed in Scotland, and that the judgment of the average local Sheriff is as satisfactory as that of the average Lord Ordinary. The statistics referred to cannot, of course, show in what percentage of the whole civil causes brought before the Scottish Courts the litigants exercise their option of selecting a Lord Ordinary as the judge of first instance, for in a large proportion of the cases initiated in the Court of Session there is no option, there being classes of cases still excluded from the Sheriff Court (such as divorce or declarator of marriage or reduction). Excluding these the percentage of litigation initiated *by choice* in the Court of Session is represented as trifling. The question accordingly seems to reduce itself to this,—might not the still reserved classes of action now quite safely be entrusted to the Sheriff Court, and so is the cost now saved of maintaining expensive judges of first instance in Edinburgh, merely to afford a small percentage of the litigants in Scotland an option to bring their cases in Edinburgh.

The actions which are excluded from the Sheriff Court are now very few. There is first of all the action of divorce, or of declarator of marriage, or of nullity of marriage. Since

the war divorce actions have, unfortunately, become very numerous, but only a very infinitesimal fraction of them are defended, and they are mostly merely a judicial formality,—half a dozen, or perhaps a dozen, of them being disposed of on a Saturday forenoon. Even where they are defended they should present no special difficulty to a trained judge in the Sheriff Court, accustomed daily to weigh evidence. Not one divorce case in a hundred raises a question of law, and, of course, a judgment in a divorce suit is subject to appeal, like any other judgment by a Court of first instance. The Sheriff Court now entertains and satisfactorily disposes of a very large number of actions of separation and aliment, and adherence and aliment, and actions relating to the custody of children, many of which involve far more delicate domestic questions than are ever likely to present themselves in a divorce suit or in an action of declarator of marriage or nullity of marriage, the number of which latter class of action is at any rate negligible. In these circumstances it is represented that the reservation of such actions to a Lord Ordinary has become now a mere sentiment, and that a judge of first instance in the Sheriff Court, who is daily deciding other most important questions, cannot now be considered incapable of disposing of what are called "consistorial causes." Sentiment, of course, is not dead in the world, but the country's finances are not in a condition to permit of sentimental expenditure in any department of the civil service.

The only other form of action which is still debarred in the Sheriff Court is the action of reduction. It is rather difficult to understand why this exception should remain, when the 1907 Act conferred upon the Sheriff Court a practically universal jurisdiction in civil causes, for the validity of documents is a question which is daily being incidentally dealt with by the Sheriff, under Sheriff Court rule 50, and a reduction action is only another formal way of presenting such questions for judicial determination.

As regards civil jury trials, it is pointed out that the retention of the office of Lord Ordinary is not necessary merely because an action may be sent for trial by a jury, for a Lord Ordinary does not necessarily preside at a jury trial. The Sheriff Court Act of 1907 conserved the right (which was first introduced in Scotland by the Judicature Act of 1825) of a litigant in the Sheriff Court having his action removed to Edinburgh for jury trial. It is much to be feared that this right has been abused, and that appeal for jury trial has, because of the possible attendant expense to the defender,

been largely resorted to by impecunious claimants in damages actions as a lever to concuss a payment, and a Commission to consider possible reform of the judicature in Scotland could not avoid gravely considering, amongst other things, whether this ancient privilege of advocation of a cause to Edinburgh for jury trial is any longer appropriate in present-day conditions. The capacity of a Sheriff to preside at a jury trial has been recognised in the Sheriff Court itself, for the 1907 Act made it competent for the Sheriff and a jury to deal with a workman's claim for damages for personal injury arising out of his employment,—a class of case usually involving more intricate questions of fact and law than, say, a claim for injury sustained in consequence of a collision between two vehicles on land, or two vessels at sea. The Sheriffs are daily trying cases of this sort, for, after all, the proportion of cases advocated to Edinburgh for jury trial is very small. If a Sheriff Court judge is regarded as capable himself of deciding such a case upon the evidence presented to him, it is difficult, indeed, to see why he should not be regarded as capable of directing a jury as to the verdict to be given upon the evidence presented to them. It may become a question for a Commission whether jury trial in a civil cause is appropriate at all in Scotland, but, if it is to be maintained, the Commissioners will certainly be required to find a reason why a Court of Session judge should be regarded as more suitable than a Sheriff to preside at a civil jury trial; and why a pursuer, often worth nothing, and frequently suing on the poor roll, should have the power of forcing on his opponent an expensive form of litigation in Edinburgh, when there are local Courts at his door, quite suited to his needs.

There is, accordingly, not a little force in the suggestion that the time has now arrived when the judicial anomaly,—peculiar to Scotland,—should be removed, of there being two alternative judges of first instance, the one being as suitable as the other; and the question is very pertinent whether the very considerable cost involved in the continuance of this anomaly might not now be saved to the nation by the Sheriff Court becoming the universal Court of first instance in civil causes. The minor duties of the Lord Ordinary need not here be considered. It is pointed out, for example, that it is a glaring anomaly that a Sheriff should be capable, as he is recognised to be in the Bankruptcy Act, of doing everything which a Lord Ordinary can do in the important realm of bankruptcy, whilst the formal duty of nominating a judicial factor should still require the intervention of a Lord Ordinary. A rearrangement of the functions of the Scottish judiciary would, of course,

involve certain legislation, but it need not be of an intricate character. If such proposals as indicated above were given effect to, probably a short Act of a couple of clauses would suffice, the one providing that all duties (other than as appellate judge) in use to be discharged by the Sheriff-Principal, or imposed upon him by statute, should henceforth be discharged by the local Sheriff-Substitute (who would then be termed the Sheriff); and the other providing that any duties devolved by statute upon the Court of Session, and in use to be discharged by a Lord Ordinary, shall henceforth be discharged by a Sheriff.

III. The Land Court.

Another consideration which is likely to be forced upon the attention of any judicial Commission would probably be whether the cost of the maintenance of the Land Court is warranted. This tribunal costs some £8000 a year, and the question is urgently being asked, what does the nation get for it? In its inception what is now the Land Court was a temporary arrangement for allaying unrest amongst the crofter population of the north of Scotland. The Crofters Act of 1886 set up a Commission of three members for taking measures in crofting parishes for fixing fair rents and promoting security of tenure to the crofting population. But when the Crofters Act of 1886 was repealed by the Small Landholders Act of 1911 the crofting Commissioners were replaced by an elaborate Land Court, comprising a legal chairman with a salary of £2000 a year, and four lay Commissioners with salaries of £1200 a year. Many people thought then that this was an unnecessary extravagance, and that opinion has gained ground since. The care and attention which the Land Court bestows upon its duties is freely recognised, but it is pointed out that in the districts of Scotland where the Land Court operates the local Sheriffs are far from being overburdened with work, and that they could administer the Small Landholders statute quite as satisfactorily, and perhaps more satisfactorily than a perambulating Land Court, whose knowledge of local conditions must necessarily be second-hand knowledge. If necessary—but it is thought it would seldom be necessary—the Sheriff might have power to call in skilled agricultural assessors, as in maritime cases he has power to call in skilled nautical assessors, drawn from a panel approved by the Scottish Office. What was originally a temporary expedient seems to have developed into a permanently costly tribunal, which, in the opinion of many people, need never have existed, and might now quite well be dispensed with.

There are other directions in which it is urged economy could be effected in the Scottish judicial system, without in the least impairing, but on the contrary enhancing, its efficiency and its usefulness, but minor matters need not here be dealt with. Enough has been said we think to show that the circumstances of the present time are vastly different from the circumstances in 1870, and to show the reasonableness of the demand for a Commission being now appointed, to report upon the possibility of economy being effected, by drastic revision of existing judicial methods. In an economy campaign all sentiment must be eliminated, and the one and only consideration must be how can Scotland, in the matter of its judiciary, be best served at the least expense? We offer no opinion upon the feasibility of the many suggested reforms which are in the air, some of which we have indicated. All we plead for is *investigation*, and that surely cannot be refused by a Government pledged to a campaign of civil service economy.

The form of inquiry is, of course, in the discretion of the Government; but the hope may be here expressed that the mistake of 1870 will not be repeated as regards the constitution of the Commission. That Commission was an unwieldy body of twenty-four, comprising four Court of Session judges; three English judges; four advocates; two Writers to the Signet and one S.S.C.; two procurators; one Sheriff-Principal; and two Sheriffs-Substitute. The representation of the business world (who have the main interest) was very meagre, and conspicuous by absence was the official interest. A Clerk of Session and a Sheriff-Clerk should surely have had a place upon such a Commission. It is not surprising that, in 1870, there were several minority reports. The departmental Sheriff Court Commission of 1906, which led up to the Sheriff Courts Act, 1907, and the Bankruptcy Commission of 1912, which led up to the Bankruptcy Act, 1913, were models of a small practical Commission. The Bankruptcy Commission, for instance, consisted of only seven members, comprising a Lord Ordinary; a Sheriff; a chartered accountant; Supreme Court and Sheriff Court solicitors; and a merchant of standing. A committee should be small in number and representative of all interests affected, such as, for instance, one of the Court of Session judges selected by themselves; one of the Sheriffs selected by themselves; one of the Sheriffs-Substitute nominated by their society; a Clerk of Session, and an experienced Sheriff-Clerk; one or two solicitors, and a representative of the public, such as a chairman of an important Chamber of Commerce. A small

committee of this sort (with perhaps a chairman having no personal interests, as for instance one of the House of Lords judges) would have some hope of reporting expeditiously, and where economy is concerned, obviously expedition is of importance.

LORD SHAW OF DUNFERMLINE AND THE AMERICAN BAR ASSOCIATION.

In these days when the power of a League of Nations to reconcile the conflicting interests of the various members of the family of nations—members always with widely divergent sympathies and often with little in common—is on trial, it is well to emphasise the remarkable community of interest which exists between Americans and ourselves in language and in law. Although as regards law the point of the coincidence of interests is generally supposed to be in the common law of England, yet the choice of the American Bar Association in selecting a representative from "across the herring pond" to be their guest at their annual meeting has not infrequently fallen upon a Scotsman. The names of at least two eminent Scotsmen so selected will readily occur to all, viz., Lord Finlay of Nairn, and Lord Haldane of Cloan who as Lord Chancellor put the Great Seal into commission in order to address the members of the American Bar Association at Montreal in 1913. But these Scotsmen were in a sense exiles from their native land who had won fame and fortune in the practice of an alien law beyond the Tweed. Lord Shaw of Dunfermline is the first Scotsman who was also a Scots lawyer to be called upon to address the American Bar Association. To him was entrusted the task of revealing not so much the historical community of legal interest between Americans and ourselves, but rather the essential identity of the spirit of justice as administered in States progressing along parallel lines of civilisation. The title which he chose for his address delivered at the third session of the Association's meeting at San Francisco on 9th August, 1922, was "The Widening Range of Law."*

In Lord Shaw's conception the widening range of law has a dual reference. It refers in the first place to the ever-increasing variety and wealth of human interests which go to make up the facts to which it is the daily business of Courts to apply the law. It also refers to the spirit of the administration of the law in whose history is traceable a tendency to replace the narrow formalism of early legal doctrine by a riper attitude of mind able and willing to look at the essential meaning of

* Published in the "American Bar Association Journal," September, 1922.

facts untrammelled by consideration of the form in which they happen to have been expressed.

This widening of the spirit of legal concepts forms the groundwork of Lord Shaw's address. He begins by tracing the development of contracts in the Roman law. In the real contracts the law looked to what was done; in the verbal contracts the law looked to the words that were spoken; but in the consensual contracts the law could disregard forms and look at the intention. Lord Shaw then enumerates the consensual contracts, the highest point of development of Roman law, and adequate to deal with the requirements of Roman trade. "How embracive," says Lord Shaw, "How embracive the cate-"gory is! But did ever the wildest dreamer among the absolu-"tists of the ancient world conceive of the vast fertility of "illustration of the items of the list which a new world dis-"plays? For the *emptio-venditio* go to your emporia, your "bourses, your exchanges. For *societas* watch your great cor-"porations, so powerful as to threaten to dominate Legislatures "and States. For *locatio-conductio* see your networks of rail-"ways, your shipping enterprises, your transport, linking "ocean with ocean. For *mandatum*, your drummers drumming "everywhere, by land and sea."

For a parallel development in modern law in which the intermediate stage only has been reached Lord Shaw goes to the Scots system of conveyancing. Practically the same early steps of development have occurred there as in the Roman law of contract. From symbolic delivery by earth and stone, clap and happer, hasp and staple, &c., we passed to a stage of verbalism, of written contracts, of Courts of construction. Even the field covered for the Romans by consensual contracts has been given over by the exigencies of modern business life to the bonds of literalism. "With the spread of education and "the advance of science, the use of letter, of telegram, and of "the telephone message confirmed by the business man's note—"all these lift the bulk of the consensual contracts into the "grip of a literal record, and that so effectively that one may "explain the record if it be ambiguous, but, if not, one must "stand to it, and to vary it is bad law."

In this era of verbalism or literalism not only is the intention of the parties in danger of being obscured by the words they have used, but many words and expressions have already been interpreted by the Courts, and have acquired a particular meaning, and through the citation of precedents a man's intention is in danger of being obscured not only by the words he himself has used, but also by the expressions which others

may have used before him. The range of literalism is not confined to private contracts and wills, but occurs also in the growing body of administrative statutes which regulate the relationship of the individual to the State.

Lord Shaw here calls in the aid of mythology. Procrustes, the tyrant of the iron measure, represents the undue weight attached to precedents in construction. "The literalist, very "loyal to authority, stands within it as within a fortification. "If you tell him that 'the letter killeth, but the spirit giveth "'life,' he asks you for the reference; and then, when you give "it, he says that he has not got the book in his library. Yet "must it not be true that wherever that spirit has been violated, "then it stands to reason that some element of mischance may "have crept in? Alas! in this world the smooth has to be "taken with the rough, and literalism, with its mischances, "has the merit at least of binding judges and interpreters to "construe the actual terms employed, without daring to invent "for themselves another meaning, not out of the grantor's "words, but out of their own head."

Lord Shaw proposes as a counterpoise to Procrustes the figure of Antæus, the son of Neptune and Terra, who kept his feet in touch with Mother Earth and drew refreshment and new life. This constant contact with reality and with the correlations of things is an essential condition of the construction of right and duty as between man and man. Lord Shaw then passes from a consideration of right and duty as within the State, and concludes his address on an international note.

In the international sphere it is not the correlation of things that is required. The danger lies in collision of method. "Here is no blending, no co-ordination, no compromise. It "is war to the knife—war between the method of force on the "one hand and the method of reason on the other." The only safeguard against such a collision is an alliance or understanding between those nations whose internal history shows that they have adapted themselves to the pursuit of justice and the reconciliation of antitheses by the method of reason.

WHEN IS A LIMITED COMPANY NOT A LIMITED COMPANY?

The answer to this question appears at present to be,—when it carries on business in Tennessee. At least that is the answer suggested by the decision of the Supreme Court of Tennessee in the case of *Equitable Trust Company* v. *Central Trust Company*, as reported in *The National Corporation Reporter* of Chicago for 17th August, 1922. This decision, however,

is understood to be under appeal to the United States Supreme Court. There appear to have been several separate proceedings in the State Courts of Tennessee involving the same subject-matter and extending over a considerable period of time, but the material facts when disentangled from the procedure are quite simple.

The Dayton Coal and Iron Company, Limited, was incorporated in Scotland in 1897 by registration under the Companies Acts for the purpose of operating coal and iron deposits in Rhea County, Tennessee. It in fact carried on its business in Tennessee but at no time made any attempt to comply with the laws of the State of Tennessee with reference to the admission of foreign companies to do business within that State. In 1903 the company issued debentures secured upon its holdings in the State of Tennessee. Two Scottish banks each acquired a block of these debentures as security apparently for advances to customers. Of these banks one had been entered in the company's register as owner of certain shares of the company and had voted on said shares by its proxies at the meeting which authorised the issue of debentures. In 1913 at the instance of certain creditors in Tennessee the company was ordered to be wound up by the Courts of Tennessee. In the case above referred to certain creditors of the Dayton Company, represented apparently by the Equitable Trust Company, brought an action in the Chancery Court of Tennessee against the Central Trust Company as trustee under the mortgage securing the debentures. In this action the creditors sought to have it declared that the two Scottish banks were liable as partners of the company upon the theory that they were shareholders of a foreign incorporation which had carried on business in Tennessee without having complied with the laws of that State respecting foreign incorporations doing business within its territory. In satisfaction of this alleged liability the creditors sought to attach the banks' preference, as debenture holders, on the property of the company in liquidation. With respect to one of the banks the Chancery Court decided that as it held the debentures purely as security for advances to the owners of the debentures it was not a "stockholder" and therefore not liable as a partner for the debts of the company. As regards the second bank, however, the Court held that its voting by proxy on its shareholding at the meeting authorising the issue of debentures constituted it a "stockholder" and as such liable as a partner of a foreign incorporation failing to comply with the State laws for all the debts of the company incurred in the State of Tennessee or incurred elsewhere with a view to performance there. The

Court granted the successful creditors access to this bank's share as a debenture holder of the property of the company, leaving them to seek any further relief if their claims were not fully satisfied by resort to the Courts of the bank's domicile.

On appeal this finding was sustained by the Supreme Court of Tennessee. The ground of the decision we quote from *The National Corporation Reporter*—The Dayton Company "not "having complied with the laws of Tennessee with reference "to the admission to that State of foreign corporations its "stockholders were, with reference to all business transacted "by it in the State, or transacted elsewhere with reference to "performance in the State, partners, and as such individually "liable for all the insolvent company's debts so incurred." This decision, as we have stated, is believed to be under appeal.

The doctrine of law involved in this decision of the Supreme Court of Tennessee is so novel and so far-reaching as to have alarmed the financial interests in the United States itself. The same result would obviously have been reached had the Dayton Company been incorporated, not in Scotland, but in one of the States of the Union other than Tennessee. Accordingly an interesting question of American constitutional law is likely to be presented for the decision of the United States Supreme Court.

To take the elements of this decision as seen from the point of view of international law the first thing that strikes one is that in the law of the States of the Union—or at least in the law of Tennessee—the *persona* of a foreign incorporation as such is not recognised. It must have the *imprimatur* of the law of Tennessee before its artificial personality can be recognised. It is of course necessary that a State should have power to prohibit alien *personæ* whether natural or artificial from entering, or from carrying on business within, its territory. No one could cavil at the exercise of that power, or at the imposition of a penalty payable to the State whose prohibition was infringed. But the question at present under consideration is quite a different one and does not in the least involve interference with the exercise by a State of sovereign power. The rule of international law as generally recognised is that the law under which a company is incorporated regulates, not only the rights of the members as between themselves and as between themselves and the company, but also defines the powers of the company to carry on trade as a separate *persona*. It is always, of course, open to the particular State concerned to say whether a foreign incorporation having such power to trade as a quality of its artificial *persona* is to be allowed to exercise that power within the territory of the State concerned.

No such question appears to have arisen in the present case, for the Dayton Company was allowed to trade in Tennessee without let or hindrance between 1897 and 1913. What the judges of the Tennessee Courts said was this—"The Dayton "Company not having received the *imprimatur* of the law of "Tennessee we can't recognise its corporate existence. In "other words, we will not look at the law under which it was "incorporated." That is a distinct breach of the comity of nations which requires that the Courts of Tennessee as well as of any other State should have regard to the laws of its neighbours and the *personæ* of their creation.

Having decided that they could not have regard to the law of Scotland, upon what principle could the Courts of Tennessee hold that the stockholders of the Dayton Company were members of a partnership and liable as such? The bank itself did not exist as an incorporation, and therefore as a *persona* that could be held liable, except by the force of Scots law. Beyond the one incident of voting by proxy at the meeting of the Dayton Company for the issue of debentures there was no evidence of the bank having taken part in a joint adventure in Tennessee. Nor could the bank have been made liable as purporting to represent a bogus company for it never was in Tennessee nor was it cited personally there.

But perhaps the most piquant thing about the decision was that the Court after refusing to recognise an incorporation by Scots law should recommend its suppliants to have resort to that same law for further satisfaction of their claims.

NOTES ON THE INCREASE OF RENT, &c. (RESTRICTIONS) ACT, 1920.

What is "proper state of repair" in the sense of sec. 7 of the Act of 1920, which forbids a mortgagee to call up his security so long as "the mortgagor keeps the property in a "proper state of repair?" This question is increasing in importance the longer the present restrictive legislation remains in force, and it is probable that, both as regards rents and mortgages, the provisions as to repair and habitability of premises will be strengthened in the extending enactments which it is anticipated the Parliamentary Committee now considering the subject will recommend. Accordingly, the general observations of Mr. Justice Sargant in *Woodifield* v. *Bond*, 1922, 2 Ch. 40, should be noted. He was of opinion that the expression "proper state of repair" must be measured by the general condition of the property at the date of the mortgage, and must not be extended beyond its preserva-

tion in a corresponding state. The phrase is not to be read as equivalent to "good" or "tenantable" repair, nor in a sense to compel a rebuilding of the whole or of an integral part of the whole structure, such as is involved in a new roof or the provision of a damp course. The language of the proviso is to be regarded as satisfied if the property is repaired having reference to its general condition at the date of the contract and in relation to the nature of the bargain, that is, so as to keep it not substantially deteriorated, and as good a security for the mortgage money as it was.

The statute provides (sec. 12 (2) (1)) that its provisions shall not apply to a house "*bona fide* let at a rent which "includes payments in respect of board, attendance, or use "of furniture." In *Nye* v. *Davis*, 1922, 2 K.B. 56, to which we have already referred in these notes, a flat was let under an agreement which obliged the lessor to remove house refuse and carry in coals free of charge. It was held by the Divisional Court (reversing the County Court judge) that these services constituted "attendance," so as to exclude the premises from the operation of the Rent Restrictions Acts.

Now, in *King* v. *Millen*, 1922, 154 L.T.J. 150, it has been held that, where the obligation on the landlord was only to keep clean the hall and staircase leading to the flat, such a contract did not constitute "attendance," and the flat was not *bona fide* let at a rent which included payments in respect of board, attendance, or use of furniture within the meaning of the sub-section. The landlord, of course, founded on *Nye* v. *Davis*, but that case was held distinguishable as to its facts in this respect, namely, that in *King* v. *Millen* the common hall and staircase were not demised; the tenant had merely in them a right of way, and as the services rendered were not rendered to the tenant *in the flat*, and were not in the nature of personal service, there was no "attendance" within the section.

In view of the importance of sub-letting under the Rent Restrictions Act, we notice the case of *Terrell* v. *Chatterton*, 1922, W.N. 227. By an agreement dated 11th March, 1919, the plaintiff let a house to defendant for three years, at a rent of £135, the defendant covenanting not to assign, under-let, or part with the possession of the demised premises without the consent of the plaintiff, such consent not to be unreasonably withheld. On 14th February, 1920, the plaintiff sub-let the top floor of the house for the remainder of the term, at a rent of £90. In June, 1921, the plaintiff discovered that the defendant, without his knowledge or consent, had sub-let the remainder of the premises on a yearly

tenancy, with the option to the sub-lessee to continue the tenancy for the residue of the original term, at a rent of £180. The defendant had given possession to the respective sub-tenants. Now this was an action for a declaration that the stipulations of the lease had been so broken as to entitle the plaintiff to forfeit the lease. Astbury, J., was of opinion that there had been no breach of the lease, as the prohibition against sub-letting did not extend to sub-letting of a portion without consent. Appeal against this was allowed, the Court holding that though the sub-letting had been effected in two separate transactions, the defendant had in fact sub-let the whole without the consent of the plaintiff. The consent given to the first sub-letting did not extend to the second. There had therefore been no consent to the sub-letting of the whole, and the covenant had been broken so as to involve a forfeiture of the lease.

Pending the issue by the House of Lords of their judgment in *Kerr* v. *Bryde*, we note that in *Schmidt* v. *Christy*, 1922, W.N. 120, the Divisional Court, reversing the judgment of the County Court judge, came to the same conclusion as the Court of Session have done. Here the premises in question had been let at a weekly rent of 35s. from 1st January, 1921. This was a new tenancy, and no notice of any increase of rent had been given to the defendant or any previous tenant. The Court unanimously held that only the standard rent of 21s. was recoverable, as the requirements of sec. 3 (2) had not been complied with, and that the provisions of sec. 3 (1) were also a bar to the landlord's claim (*Newell* v. *Craigford Cottage Society, Limited*, 1922, W.N. 72) for there was no period since 1st January, 1921, during which but for the Act the landlord would have been entitled to possession. It was now established that, as against a new tenant, a landlord could not upon a re-letting by a mere agreement increase the rent from the outset above the standard rent. No such increase could become operative till after the determination of an existing tenancy (*Glossop* v. *Ashley*, 1921, 2 K.B. 451), and it was there recoverable only if valid notice had been given under sec. 3, sub-sec. 2, of the Act.

THE PLEADER.

The doctrine of frustration of the venture seems to have obtained an established place. We have already expressed the opinion that it is not one which the Courts will be inclined to extend, and there is yet to be given from the

bench a definite exposition of its real meaning. In two recent Sheriff Court cases it was considered. In *M'Calmont* v. *M'Neil & Sons*, 38 Sh.Ct.Rep. 226, it was held that an apprentice could not claim wages under his indenture or damages for breach, the contract having been frustrated owing to depression of trade due to foreign competition, in consequence of which British factories (including this particular employer's premises) had to close down. In *Robertson* v. *Bessler*, 38 Sh.Ct.Rep. 248, Sheriff Fyfe made lengthy considered observations as to the effect of the doctrine. He there held that whether a contract has been frustrated is in each case a question of circumstances.

Again, it was argued in *Scott & Sons, Limited*, 1922, 1 S.L.T. 468, that where a contract contained the usual arbitration clause, and a plea was made that the contract could not be enforced in consequence of frustration of the venture, that question did not fall to be sent to arbitration, as it did not arise under the contract. The contract was for the export of jute goods from Calcutta to Argentina, and as such export had been rendered illegal by an Indian Order in Council, delivery was not made by the sellers. Thus the question arose as to liability for breach. It was held that the dispute as to whether there was liability to deliver fell to be determined by the arbitrator.

What is the effect of a special contract on carriers' liabilities at common law? This was the subtle and highly important question discussed by the Court of Appeal in *Great Northern Railway Company* v. *L.E.P. Transport and Delivery Company*, 38 T.L.R. 711. To the consideration and decision of it the judges have given great care, and their opinions are deserving of study for their statement of the development of the common and statute law of carriage. A common carrier is just a person who professes himself ready to carry for everybody. The liability of a person who makes a public profession of that sort is fixed as being that he is the insurer of the goods carried by him, with certain limited exceptions. Carriers, however, began very soon to add limitations to their liability as insurers, either by a general notice or by a special contract. In the case of special contracts the limitations got to such a stage, and particularly in the case of railways, that in 1854 Parliament enacted that all railway companies must carry; they may limit their liability by special contracts if they are signed by the consignor and if they are just and reasonable, but no terms which free the company from liability for negligence of its servants shall be taken to be just and

reasonable. Continually during that process of carriers attempting to limit their liabilities and the imposing of limitations by Parliament, this sort of question arose, "You have "made a special contract limiting your liability in a particular "respect—what is the rest of your liability? Is the common "carrier's liability still left, except in so far as you have "limited it by the contract, or is the position that, as you "have not accepted the full common carrier's liability, you "are merely carrying for reward, and are only liable for "negligence?"

Prior to the recent decision which has now been given, the leading case was *Baxendale* v. *Great Eastern Railway Company*, L.R., 4 Q.B. 244. That company were carrying pictures from Antwerp to London, and they had a bill of lading which contained considerably larger exceptions to liability than that of common carriers under the custom of the realm. But the goods being pictures, they wanted the protection of sec. 1 of the Carriers Act of 1830, to which the answer was, "you are not common carriers, because you have "entered into a special contract, and the fact that you have "made a contract which varies a common carrier's liability "prevents you from being common carriers at all." A Court of seven judges held that the mere fact that in one respect the company had freed itself from liability as common carriers did not necessarily or naturally involve that they ceased to be common carriers as to other matters. *Prima facie*, they remained common carriers except in the respect in which they had varied their liability by special contract.

In the case we are discussing, *Baxendale's* case was reaffirmed, and, accordingly, the law on the question may now be accepted as this, namely, that in each particular case we must look at the terms of the contract to see whether they are such that the whole of the common carrier's liability is excluded, or whether it is only that in a certain portion it is varied, and varying the common law liability in one respect does not exclude the rest of the common carrier's liability. In the action by the Great Northern Railway above referred to, it had happened that the company had paid damages for goods which had been injured in transit, and they were suing for recovery of the amount so paid from the defendants, whom they alleged to be in fault. Mr. Justice Horridge had held that the company's consignment contract only made them liable for negligence, and that, as they had not been negligent, they need not have paid the claim, and, therefore,

could not recover it. On appeal, as we have indicated, this decision was reversed, and it was laid down that the fact that the company under their contract were only liable for negligence did not exclude their liability otherwise as common carriers; that as common carriers they were bound to pay the damage, and were now entitled to recover.

Literature.

NOTABLE BRITISH TRIALS—TRIAL OF GEORGE JOSEPH SMITH. Edited by Eric R. Watson, LL.B. Edinburgh and London: William Hodge & Co., Ltd. (10s. 6d. net.)

After a perusal of this excellently edited addition to the series of "Notable British Trials," most readers will agree with Sir Edward Marshall Hall, K.C., who defended, that the case is "without parallel in the history of "English crime." Apart altogether from the brutality of the crime with which he was charged and the revolting nature of his life, the trial of George Joseph Smith has many points of interest for lawyers. A summary of his life, as told by Mr. Watson, is thrilling. Born in 1872, he was married in 1898, and his wife was alive at the date of the trial. In 1899 he goes through a form of marriage with another woman. In 1908 he defrauds a woman under a promise of marriage. In the same month, in the same year, he again marries. In the year following a further marriage takes place. In 1910 he marries Bessie Mundy, and in July of 1912 Miss Mundy is found drowned in a bath. It was in connection with her death that Smith was tried. In November, 1913, he marries Alice Burnham, and in December of the same year Miss Burnham is found drowned in her bath. In September, 1914, he again marries, and on 17th December of the same year he marries Margaret Lofty, who is found the following day dead in her bath. In all the three cases of death a verdict from misadventure was returned. As told by the learned editor in his carefully considered introduction, the story is almost incredible. The evidence upon which Smith was convicted will not meet with universal assent among lawyers. The indictment charges him that "you, on the "13th day of July, 1912, feloniously, wilfully, and of your "malice aforethought did kill and murder Bessie Constance "Annie Mundy." There is nothing said in the indictment about the two subsequent deaths. Overruling the objection of Sir Edward Marshall Hall, Mr. Justice Scrutton, at the trial, admitted evidence of the subsequent deaths to show whether Smith had a system of murdering women with whom he went through a form of marriage in order to obtain their money. He, however, warned the jury that they were not to use the evidence for the purpose of inferring that the prisoner was a man of bad character, and very likely to have

committed the crime. How far such a warning would affect the jury is difficult to appreciate. Other interesting points of evidence arise during the trial and in the Court of Criminal Appeal, but here we must leave the interested reader to Mr. Watson's report. The trial established a record. No fewer than 264 exhibits were put in, and there were 112 witnesses. The legal and medical aspects of the trial receive special consideration. The questions of "Legal Medicine" and "Studies in Psychology" discussed by Mr. Watson give an added interest to a remarkable trial. There are several well-executed photographs and diagrams throughout the book.

Obituary.

At Edinburgh, on 8th October, Mr. William Barbour, O.B.E., member of the Scottish Land Court. Mr. Barbour, who was born in 1863, was educated at Dumfries Academy and Glasgow University. At the inception of the Board of Agriculture for Scotland he joined the staff as superintendent of the live stock division. In June, 1908, he was appointed a member of the Scottish Land Court in place of the late Mr. Alexander Dewar.

At Stirling, on 9th October, Mr. J. S. Fleming, of Messrs. Fleming & Buchanan, solicitors. Mr. Fleming, who was in his eighty-eighth year, was a native of Stirling. He was well known as a writer on archæological subjects, and published several books dealing with Stirling.

At Kilmarnock, on 13th October, Mr. William Middlemas, town-clerk of Kilmarnock. Mr. Middlemas had held the office of town-clerk for over thirty years, and also carried on an extensive private legal practice. He was greatly interested in agricultural affairs, and carried on a farm on his own account in the parish of Fenwick. He is survived by a widow and two daughters.

At Waterybuttes, Errol, on 18th October, Mr. John Ogilvie, solicitor, Dundee. Mr. Ogilvie was senior partner of Messrs. J. & J. Ogilvie, a firm which has been established in the city of Dundee for over a century.

At Edinburgh, on 19th October, Mr. John W. Deas, S.S.C., aged seventy years. Mr. Deas was born at Cockburnspath, and went early in life to Edinburgh to follow the profession of law, from which he retired in May last, after nearly forty years of practice, during the last seventeen of which he was in partnership with his youngest brother, the present city treasurer of Edinburgh.

At Helensburgh, on 25th October, Mr. James Spalding, in his ninety-first year. Mr. Spalding went to Helensburgh as a lawyer sixty years ago, and recently was elected Dean of the Faculty of Procurators of Dumbartonshire.

At St. Boswells, on 26th October, Mr. Andrew Newlands, S.S.C., Edinburgh, in his seventy-fifth year. A native of Innerleithen, Mr. Newlands served his apprenticeship in Jedburgh, and prosecuted his legal studies in Edinburgh. For many years he was in the office of Messrs. Finlay & Wilson, and was admitted a member of the S.S.C. Society in 1877, when he commenced business. He acquired a considerable practice in the Court of Session, and was identified with rights of way cases. He is survived by his widow and two sons.

At Edinburgh, on 28th October, Major John David Outram, late of the 3rd Battalion Highland Light Infantry. Major Outram, who was born in Glasgow in 1866, was a nephew of George Outram, author of "Legal Lyrics." He was admitted to the Faculty of Advocates in 1891, but his interests lay rather in soldiering than in law, and he served in South Africa during the Boer war. For some time Major Outram had been in failing health.

Notes from Edinburgh.

PARLIAMENT HOUSE, 31*st October*, 1922.

THE opening stages of the winter session have been marked by unsettled and unsettling conditions, complaints by pleaders as to work not being plentiful; similar complaints by agents who, further, have the exorbitant new Court dues to worry them; a practically new Second Division of unknown qualifications as an appellate bench; a new Lord Justice-Clerk to preside over that Division; and the only judge of that tribunal having claims to experience of it absent through an unfortunate accident; rumour, seemingly well founded, as to the contemplated resignation of another judge—these are some of the disturbing elements which signalise the start of the new session. To make matters worse, the political turmoil and upheaval, whether justified just now or otherwise, have come at a very bad time for the legal world, or at least that section of it which confines its attention to strictly legitimate business. It is a time of unrest for all, and as there is good reason to believe that in a certain district in Scotland something very like ill-will is being harboured against the Court of Session the political mix-up just now is to be deplored for it provides additional items to swell the programme of bitter comments levelled at the supreme tribunal and those who constitute it and make their living by and through it. Maybe jealousy has a lot to do with the harbouring of the poor opinions concerning the College of Justice, but whether that be so or not, the poor opinions are there and they do harm.

Regarding the situation as it stands through the eyes

of an ordinary citizen there is ground for faith being shaken in the excellence of the administration of law and justice in this land, when it is found that that administration in its component parts depends on the political party, or faction, or even gang, which for the time being has the monopoly of filling posts whereby it rewards those who most diligently adhere to the programme laid down for the guidance of good and faithful politicians. What can the layman think—what does he think—at the present time when he finds that because the chief law officer of the Crown in Scotland has not seen his way to adhere to the programme of an alleged majority of his own particular political party he has, as a self-respecting man, to hand in his resignation? What on earth, says the layman, has a political squabble got to do with the fair and seemly administration of law and justice? Does it make any difference to the nation if the official charged primarily with the prosecution of crime happens to be a follower of the leader of one particular body of politicians and not of another? The difference does not appeal to the nation, though perhaps it might appeal to the individual against whom a prosecution happens to be brought, for if there be any real virtue in the branding and labelling of parties according to political bias, it surely would be a source of abounding gratification to an alleged embezzler to know that his prosecution lay in the hands of a fellow politician. Conversely the criminal of a different brand might not enjoy the idea that his prosecution lay in the hands of a bitter opponent of his line of politics. To lawyers ideas of that sort may seem far fetched, but lawyers do not, unfortunately, attempt to see things through the eyes of other people. The public knowledge that a judge forgets all politics once he is elevated to the bench reassures some people that all is well with the administration of law and justice, while it does the very opposite with the many who are prone to criticise the legal profession in an unfriendly way, for it is regarded as sure evidence that the political rôle is merely adopted by lawyers as a means to an end, and, the end accomplished, the rôle is dropped.

The ill-conceived assumption of the existence of unworthy personal motives has, in a striking manner, been refuted by the recent resignations of the ex-Lord Chancellor and our own ex-Lord Advocate, Mr. C. D. Murray. Both had everything to gain and nothing to lose by going placidly along with what seemed to be the flowing tide, but as men of honour and of conscience they stepped out and let what seemed to be the flowing tide run along without them. Sir Robert Horne also comes out as an example rebutting the charge that opportunism

and self-interest are the lawyer's strong inducements to dabble in politics. Examples of honesty of purpose like these do not, unhappily, come sufficiently often before the eyes of the public, and yet our legal world has histories of many similar though less dramatic happenings. Maybe the three instances now brought to public notice will inspire the belief that a lawyer can be sincere and conscientious in his political activities.

If the man in the street would take the trouble to examine individual instances which go to disprove the charge of opportunism so often levelled against prominent lawyers, he would find in the case of the new Lord Justice-Clerk (to say nothing of the cases above referred to) an object-lesson well worth laying to heart. After holding the exalted and highly remunerative office of Lord Advocate with the right to practise his profession as a pleader, he accepted the still more exalted office of Secretary for Scotland, the promotion entailing the loss of no less than £3000 per annum and the further loss of being debarred from practising his profession. Mr. Munro's abilities were well proven long before he became Lord Advocate, and when he attained to that rank he made a name for himself as being a thorough and painstaking servant of the nation who made everything which pertained to his office a matter worthy of personal attention, and he did not spare himself in his devotion to duty. On his elevation to the higher rank of Secretary for Scotland, with its incongruous financial sacrifice, his devotion to duty was equally pronounced, and while, unfortunately, he has had to bear the whole blame as father of that expensive and generally execrated statute, the Education Act of 1918, his career as Secretary for Scotland will stand favourable comparison with that of any of his illustrious predecessors in office. Six years' absence from legal practice, it might have been supposed, would have begotten a suggestion of rust, particularly as regards acquaintance with case-law, but so far there has been no indication of rust having developed during the six years' isolation from the practice of law, and when he gets used to his new position great things may be expected of him. The Second Division is once more in the melting pot. If legal acumen and steadfastness of purpose, which are exemplified in its new commander, can keep things going upward in continuance of the improvement operated by the late revered and well-beloved holder of the chair, the Second Division will in time be able to depend on patronage bestowed on it at first hand. Meantime, and until its real worth is proven, it will be living mostly on transferred causes sent to it by the First Division.

It is satisfactory to find that at last the Court of Session

has moved with the times over the important matter of printing and has passed an Act of Sederunt permitting typewritten copies of proofs and appendices to be used generally in place of printed papers. The campaign started last year by the Society of Procurators in Midlothian backed up by Mr. Fred. Macquisten, K.C., seemed to have had no better result than the dissemination of the understanding that applications to substitute typewriting-reproduction for printing would be considered on the merits of each individual case, which understanding was an unsatisfactory basis on which to proceed, because people looking ahead with a possible appeal or reclaiming note in view want to figure out in advance how they will stand in the way of possible expense, and with the fear that printing would be expected of them, in many cases all ideas of appealing or reclaiming would be abandoned, which undoubtedly meant the loss of much good work to the Court of Session. As will be seen from a perusal of the Act of Sederunt passed on 27th instant which appears in this issue of the Review, the Court has approved of a pattern standard substitute for printing of proofs and appendices, and while the pattern standard is that of a certain up-to-date process of reproduction, it is open to parties to adopt other processes which as regards legibility and other essentials are of apparent equal excellence. The importance of the concession now made ought to be prominently brought before the public for the result will surely be more business being brought here, and it is needed. It may be that the costs of law-printing will now have to come down to compete with typewriting-reproduction, but, so long as the Act of Sederunt stands, the option of substituting typed reproductions is certain to be largely taken advantage of. Even allowing that printing may be brought to the same cost as the substitute, the latter offers this advantage, viz., that being possessed of the requisite apparatus, the agent can have the reproductions turned out in his own office which is a very different matter from the agent being personally liable for large printing accounts. It is unfortunate that the concession did not come in advance of the increase in Court of Session dues for the heavy dues now stand in the way of popularising litigation here; but even with this handicap there still ought to be an improvement experienced in the amount of work brought into Court through reason of the option now given by the Act of Sederunt to have substitutes for prints accepted as matter of right and not as matter of charitable toleration.

The writer's attention has been kindly drawn to an interesting point under the Workmen's Compensation Acts, par-

ticularly the War Additions Acts of 1917 and 1919, viz., the omission to extend to dependants of workmen who die as the result of accident, benefits corresponding to those accorded to workmen who survive accident. Though intended as temporary measures the War Addition Acts are having their existence continued by the Expiring Laws Act of 1922, and what was considered to be an anomaly in 1917 is no less an anomaly to-day and so long as the War Additions Acts are kept in force. While the injured workman who survives accident is entitled to have weekly payments under awards increased by three-fourths, the dependants of the injured workman who dies as the result of accident are in no better case financially than they were under the Act of 1906. This is a hardship should the death of the breadwinner occur immediately as the result of an accident, for the benefits which he, in a lingering condition, would have enjoyed by way of increased allowances are not in capitalised form available for his dependants, the War Additions Acts leaving them out. But in one respect dependants have cause to be thankful, which is the circumstance that when the breadwinner has lingered for a while and drawn compensation or has accepted a lump sum, and then dies as the result of the accident, the deductions to be made under sec. 1 of the First Schedule of the 1906 Act from the amount to be awarded to dependants on death occurring, are still figured out on the 1906 scale and not on the War Additions scale. By sec. 1 sub-sec. (2) of the 1917 Act the additional weekly sum payable under the Act is to be deemed to be part of the weekly payment under the 1906 Act for three purposes—(*a*) the provisions relating to the recovery of weekly payments; (*b*) any order made with respect to payment into Court of a weekly payment; and (*c*) the provisions of paragraph (19) of Schedule I. of the 1906 Act (which prohibits assignment, &c., of weekly payments); and shall, notwithstanding that the liability to make the said weekly payment is redeemed subsequently to the commencement of the 1917 Act, continue to be payable in the same manner as if that liability had not been redeemed. These provisions are definite enough, not a word as to deductions being figured on the increased basis, and a decision in Birmingham County Court on 2nd November, 1920, in the arbitration between the Great Western Railway Company and Litherland has given judicial interpretation of the 1917 Act as having no bearing on the question of deductions.

By the death of Sir John Rankine, K.C., LL.D., formerly Professor of Scots Law in Edinburgh University, a vacancy

was created in the Board of Examiners of Law Agents, and the vacancy has been filled by the Court by the appointment as an Examiner of Professor R. Candlish Henderson, K.C., who succeeded Professor Rankine as holder of the Chair of Scots Law and entered on his duties only two weeks ago.

The rumour mentioned at the commencement of these notes, as to the resignation of a judge, referred to Lord Mackenzie, and on the last day of the month official intimation has been given of that resignation having been made. Lord Mackenzie has been regarded as one of the strongest judges on the bench during recent years, particularly since he took his seat in the First Division, and coming at a time like the present, his loss will be greatly felt. Though he was the senior judge on the bench, his lordship was not senior as regards age, being only sixty-five, and like Lord Salvesen who was made a judge in 1905 immediately preceding Lord Mackenzie's appointment, the now retired senator, having well earned the right thereto, has many years of rest and leisure before him. As a pleader C. Kincaid Mackenzie was well and steadily employed in the best class of work, though he did not quite reach the front rank, the galaxy of contemporary talent being particularly strong. It was as a judge that his great reputation was made and during the seventeen years of judicial service his legal ability, sound common sense and courteous dignity earned for him the esteem and respect of the profession. The resignation of Lord Mackenzie has created the fourth vacancy on the bench during the year now drawing to a close. The year 1905, when his lordship was appointed a judge, also saw four vacancies occurring, through, respectively, the resignations of Lords Trayner, Moncreiff, and Young, and the death of Lord Kinross, Lord President. The First Division will now have Lord Sands to complete the bench of four judges; and it is regarded here as a certainty that Mr. C. D. Murray, K.C., C.M.G., the ex-Lord Advocate, will be elevated to the bench to fill the vacancy created.

The calling lists for 17th inst., being the first sederunt day of session, had a total of 61 new summonses and 20 of these are consistorial causes, being 18 divorces, 1 declarator of nullity, and 1 adherence and aliment. Lord Ashmore heads that list with 28, there being 11 divorces; Lord Sands follows with 22, and of these there are 6 divorces, 1 declarator of nullity, and 1 adherence and aliment. Lord Morison has 4, there being 1 divorce; Lord Constable also has 4, and Lord Blackburn has 3 with no consistorial causes among them. During the two weeks following, ere the month

closes, 56 further cases have been called and 15 are divorces. Of the 56 Lord Ashmore has 32 and 10 are divorces; Lord Sands has 15, there being 4 divorces; Lord Morison has 5; Lord Blackburn has 2; and Lord Constable has also 2, with no divorces among them.

The rolls for the Inner House have not been replenished to any great extent during the vacation. The new cases appearing in Single Bills for first and second sederunt days represent the vacation arrivals, and all told, 42 were received, being 31 in the First Division and 11 in the Second Division. The 31 in the First Division are made up of 19 reclaiming notes, 7 appeals, 3 special cases, 1 stated case, and 1 remitted cause for jury trial; and the modest 11 in the other Division consist of 4 appeals, 2 reclaiming notes, 2 special cases, 2 remitted causes and 1 stated case. After the second sederunt day a bad slump seems to have struck the Inner House in both Divisions, for all that there is to show for two weeks is a matter of 2 stated cases received in the First Division and 1 appeal in the Second Division. The increased Court dues, no doubt, explain the coming of the slump in business.

Notes from London.

THE TEMPLE, 31*st October*, 1922.

THE change of Government has produced, according to the political system of this country, the inevitable change of legal officers. Lord Birkenhead ceases to be Lord Chancellor, so that by far the most interesting among lawyers of to-day for the time being steps down from his high place. He is still as things go a young man, for he is only fifty, so that he has yet the future before him. It were vain to speculate what that future will be, more interesting to dwell for a little on what he has been and is. Inevitably his career has been one of almost continuous success, for this must be the case with every holder of that great office; the path is so long, so many steps have to be taken, that rapid rise is a necessary condition to all who tread that path and surmount those steps. He was a distinguished Oxford student, a busy junior, a much sought after silk, a competent Solicitor-General, a remarkable Attorney-General, and then for three years a Lord Chancellor noteworthy even among the long line of distinguished holders of that place. He has taken life gaily all through, a master of athletic sports, a choice boon companion, an entertaining after-dinner speaker

with an agreeable spice of insolence and even devilry which earned him years ago the name of "Galloper" Smith; he has yet known to win and retain the esteem and respect of all men, be they lawyers or laymen. In his own Gray's Inn, to which he has always been devoted, he is regarded with peculiar affection.

He has something in him of the romantic figures of an earlier age; at another period he might have emulated the career of Cyrano de Bergerac, and adroitly "pinked" his man whilst he composed a sonnet, or, as an Admirable Crichton, have engaged in a wonderful tour through Europe, equally ready with pen and tongue and sword, with spiritual and physical weapons, to engage in contest all who crossed his path. A very unusual type of Lord Chancellor forsooth! Yet it was only as Lord Chancellor that the man showed his real grit. Before his appointment many looked upon him merely as an audacious novelty who by bravado and dash had carried all before him, though dowered but with superficial ability. No one thinks that now. In the three years of his Chancellorship he has uttered a long series of judgments distinguished by their thorough command of legal principles, their knowledge of case and statute law, their robust common sense. He has illumined dark tracts, has reconciled opposing doctrines, so that what was obscure became plain and logical. One cannot wish for him ease and peace in his retirement, for there is no retirement in question. He passes into new fields of activity where it is not for us here to follow him.

For some days there was doubt as to his successor. For many reasons it was recognised at once that he must be chosen from that select band who sit with the Lord Chancellor in judgment, and it was believed for a little that the choice would fall on Lord Finlay; but he is in his eighty-first year, and though another distinguished Scotsman, Lord Campbell to wit, was made Lord Chancellor for the first time at that age, yet Lord Finlay has not of late, it is said, enjoyed robust health. "Jock" Campbell at eighty was as strong as a horse. Perpetual physical vigour was not the least of the many gifts fortune bestowed upon Campbell, a gift that continued to the very end, for it was after a busy day of work and an evening of recreation that he was called from his incessant toil by a painless death. Again, Lord Carson was mentioned, but his devotion to a particular Irish party was supposed to render him ineligible, so that almost of necessity the choice has fallen on Lord Cave. Here again

we have a distinguished Oxford career, brilliant success as a Chancery lawyer and silk, and a thoroughly satisfactory Home Secretary (1916-1919), in which latter year he was made Lord of Appeal. He has already been installed in office with the accustomed time-honoured picturesque ceremonial. He has not the engaging or piquant personality of Lord Birkenhead, but no one doubts that he will make a very competent working Lord Chancellor. His age is the suitable one of sixty-six.

Only one other legal appointment will here be noticed. Mr. Douglas M'Garel Hogg is the new Attorney-General. Some daily journals have expressed surprise, but to the bar there seemed no other choice available. Political considerations obviously made Sir John Simon impossible, and after him Mr. Hogg is, of all men at the bar, most prominent. He is fifty years of age, is an old Eton boy, fought in the South African War, was engaged for some years in commercial pursuits, and was only called in 1902, when he was thirty years old. His practice as a junior was so enormous that he broke down in health for a considerable period, and was forced to take silk in very truth to save his life. To the outsider the hesitation shown by many eminent juniors to become King's Counsel seems inexplicable, but modesty is not a rare feature of many men of first-class ability. It must be remembered that when a barrister takes silk his former work absolutely vanishes. He makes a fresh start, and in many cases the fresh start results in nothing but a barren honour and an empty career. However, Mr. Hogg did take silk in 1917, and he soon became as busy as before, but the successful K.C. is saved from many worries of the junior. He gets the best class of work, that is, cases where the law and the merits are on his side, and the result is very often a foregone conclusion. True, he must from time to time be engaged in matters where this is not so, but even here his position and ability enable him to bring about a settlement advantageous to his client and also to himself. A " sweet reasonableness " is one of Mr. Hogg's happy gifts. He has the art of making everything seem clear and simple, so that as you listen you wonder how such an obvious matter ever came to be in dispute at all. An Attorney-General is, however, a political officer, so the question remains, how will Mr. Hogg do in Parliament? He has not yet been there, thus a seat must be found for him. Many eminent lawyers have been failures in the House of Commons. Mr. Hogg has no gift of frothy elegance, but he is thoroughly sound and sensible. He will always be

listened to with respect. Beyond this is as yet on the knees of the gods, and there is no more to be said about it.

The sittings have now already advanced some way, so that one is able to take stock of the amount of litigation. In the Court of Appeal there are 192 matters to be heard. Last year there were 211, whilst the year before there were 246. In the King's Bench the total is 1236, of which 154 are taken up by Divisional Court business, leaving 1082 actions, of which 746 are without a jury. In the Probate and Divorce Division the number of suits is 888, whilst of these 668 are undefended. It is needless to go into minor statistical details, which catch the eye for the moment, only to be immediately forgotten. Suffice it to say that the bulk of litigation is perceptibly diminished. The reason is not far to seek. When trade is bad lawyers are idle for the same reason, though it may be not to the same extent as is the case with the mass of the population. Your druggist will tell you that he sells much less medicine in lean years, not that people are less sick, as they are not less quarrelsome; but they have less money, and so must spend less on drugs and law. When trade revives law revives, whether to the advantage of the community or not need not be here discussed.

That indefatigable legal reformer, Lord Buckmaster, has again been urging, in a letter to the *Times*, the need of a change in our marriage laws. No doubt reform here is needed, but his must be a voice crying in the wilderness until the new Parliament has been elected and has settled down to regular work; nay, even then it is questionable if any Government will be disposed to take the matter seriously in hand. Lord Buckmaster justly comments on the unfairness of the law that allows a man to divorce a woman when she is unfaithful to him, but does not give the same right to the wife when the husband is untrue to her. When he calls this "an "insulting inequality" he possibly allows his zeal to outrun his discretion. There are many reasons why the world should look for a higher standard in women than in men. It is in the nature of things, and will not bear discussion; but when it comes to be a question of legal right, it is a different matter. No Scots lawyer need be reminded that the jurisprudence of his country here places the man and the woman on an equal footing. This equality has worked well in the north for centuries, and will no doubt be adopted in England, though the time when remains a question of expediency and possibility. Another change, always a settled principle of Scots law, will sooner or later be adopted by English legis-

lators, and that is the principle of legitimation *per subsequens matrimonium;* if the parents of a child born out of wedlock marry after the child's birth, then the child is *ipso facto* made legitimate. For centuries the English people were determinately against this principle of civil and canon law. "We do "not wish," said the barons of the Council of Merton (1236), in uttering a pronouncement on this very subject, "the laws of "England to be changed"; and changed in this they have not been, in England at any rate, though the law is quite other in Scotland and in many of the colonies. There has been lately a growing alteration in the minds, not only of English lawyers, but of the English people, on this subject, so that, if there was only time for it, the necessary legislative sanction could be obtained, but, like much else, it must wait a day of greater leisure.

In charging the grand jury at the Berkshire Assizes Lord Coleridge referred to possible changes in the grouping of assize towns. The change he hinted at—for as yet the thing has gone no further—was from sixty-two, at which the figure stands at present, to twelve. It is certain there are too many assize towns at present, so that much time and money are expended without sufficient result. At each assizes one day is spent—one does not venture to say wasted—as commission day, when a number of imposing legal formalities are gone through and some routine business is transacted. Again, our railway system, however developed, cannot fill up all the gaps. If you have to go across country, it often saves time to come to London first, and then to go from there to your ultimate destination. To take a concrete illustration, Maidstone is at present the assize town of Kent, yet if you live a few miles out of it in certain directions you must travel a good way towards London before you can get into a cross-country train that will take you there. Then some towns are increasing enormously, whilst others are falling back, and this of itself makes a change from time to time desirable, but there is considerable opposition to any proposal. No place likes to lose its dignity as assize town, nor is it willing to lose the pecuniary advantages which flow from that position. Of course, there must be assize towns, for it would be absurd, when the witnesses in a case are all from Lancashire, and where, besides, there are powerful and able local bars on the spot, to drag them up to London instead of sending judges to the place, as has always been the course adopted. No one proposes to do that. On the other hand, the arguments for re-grouping are simply unanswerable. About twelve assize

towns seem to be sufficient, for it must be remembered that County Courts have now a much extended jurisdiction. Whether this change is practicable in the near future is, however, quite another question.

ACT OF SEDERUNT

ALLOWING CERTAIN SUBSTITUTES TO BE ACCEPTED IN PLACE OF PRINTS, AND REGULATING THE TAXATION OF EXPENSES IN SUCH CASES.

EDINBURGH, 27*th October*, 1922.

THE LORDS OF COUNCIL AND SESSION considering that great expense is incurred by litigants in printing proofs and appendices of documents required to be lodged in process, and that it is expedient to give the parties to any cause an option to use either printing or other substitute methods of reproduction for such proofs and appendices, Do therefore ENACT and DECLARE as follows:—

I. A standard substitute is hereby approved by the Lords, and a copy of that shall be exhibited in each office of the Court (including also the Bill Chamber, Court of Teinds, &c.).

II. Copies which conform to that standard in size, spacing, lettering, legibility and otherwise (reproduced by any method whatsoever) shall be accepted by the Clerks of Court and Boxing Clerks in place of prints of proofs and of appendices in Reclaiming Notes and in appeals from inferior Courts.

III. The decision of such Clerk shall be subject solely to an appeal forthwith written on the substitute and signed by or for the Agent appealing to the Principal Clerk of Session, whose decision shall be final.

IV. Unless with the approval of the Court, which may be given at any stage of the proceedings either in the Outer or in the Inner House, the Auditor shall not allow more than the cost which would have been incurred by the production in process of a substitute where such is competent under this Act.

And the Lords APPOINT this Act to be inserted in the Books of Sederunt and to be published in common form.

J. A. CLYDE, *I.P.D.*

Appointments, Business Changes, &c.

EDINBURGH.—The Right Hon. Robert Munro, K.C., M.P., has been appointed Lord Justice-Clerk in place of the late Lord Scott Dickson.

The Hon. Lord Mackenzie has resigned his office as a Senator of the College of Justice in Scotland, his resignation to take effect as from 31st October, 1922.

The Right Hon. Charles David Murray, C.M.G., K.C., has been appointed one of the Senators of the College of Justice in Scotland in place of the Hon. Lord Mackenzie, resigned.

The Hon. William Watson, K.C., has been appointed Lord Advocate.

Mr. T. M. Cooper, advocate, has been appointed junior legal assessor of the Edinburgh Dean of Guild Court, Burgh Court, and Police Court, in succession to Mr. T. Graham Robertson, K.C.

Mr. James Semple Mackintosh has been appointed an assistant clerk in the Outer House of the Court of Session in place of Mr. Walter Stewart, resigned.

Mr. Robert Waddell Marshall, Bo'ness, has been admitted a member of the Society of Writers to His Majesty's Signet.

Mr. David Miller, Leith, has been admitted a member of the Society of Solicitors in the Supreme Courts.

The firm of Ross Smith & Dykes, S.S.C., has been dissolved. Mr. Ross Smith will carry on practice on his own account under the name of Ross Smith & Co., S.S.C., at 2 Queen Street. Mr. F. M. Littlejohn will carry on practice in his own name at 26 Queen Street. Mr. Dykes retires from practice.

Glasgow.—Messrs. Carruthers, Gemmill, & M'Killop, solicitors, 81 Bath Street, have assumed as a partner Mr. Alexander Gemmill, B.L.

Stirling.—At the annual meeting of the Society of Solicitors Mr. James Dobbie was appointed Dean, Mr. G. A. Agnew, Sub-Dean, and Mr. Alexander Paterson Secretary and Treasurer. The following gentlemen were recommended to the Sheriff of the county as Procurators for the Poor for the ensuing year:—Messrs. James S. Henderson, Stirling; John M. Mailer, Stirling; John B. Frew, Kilsyth; and John A. M'Lachlan, Stirling.

Lawyers and the Victoria Cross in the Great War.—In unveiling the Solicitors' War Memorial at the English Law Society's Hall, London, a short time ago the Lord Chancellor, after referring to the creditable part which the legal profession had taken in the Great War, said—"There were 1000 solicitors and articled clerks who won "war decorations—in one case the most coveted decoration of all, the "Victoria Cross, being bestowed." The V.C. referred to was Lieut. C. H. Sewell, an articled clerk in Greenwich. The only other English lawyer who gained the V.C. in the war was Lieut.-Colonel Christopher Bushell, a barrister of the Inner Temple. These two gallant gentlemen were unfortunately killed in action. The legal profession in Scotland is represented by one V.C. in Captain Allan E. Ker, who was in practice as a Writer to the Signet in Edinburgh before the war, and has been given a commission in the Army. He at present holds a command at Edinburgh Castle.

Society of Procurators of Midlothian.—The thirty-sixth annual meeting of the society was held in Edinburgh on 31st October, when the following office-bearers were appointed for the ensuing year:—President, Mr. W. Drummond, S.S.C.; vice-president, Mr. James G. Bryson, solicitor; secretary, Mr. Peter Clark, S.S.C.; treasurer, Mr. R. D. C. M'Kechnie; librarian, Mr. Lindsay C. Steele, solicitor.

Following on the report by the Council, a discussion took place as to whether the question of having a stipendiary magistrate appointed for Edinburgh should be further prosecuted. It was pointed out that the Town Council must take the initiative, which seems an anomaly, but which is statutory, because the Secretary for Scotland can only move in the matter if the Town Council say that they desire a stipendiary magistrate to be appointed for Edinburgh.

It would seem, therefore, that legislation is necessary, and the Council are further to consider that point.

Law Agents' Examinations.—The following candidates have passed the Examination in Law which was held in Edinburgh on 16th, 17th, and 18th October, viz.:—David Alexander Aitken, B.L., Stranraer; James Barrie, jun., Glasgow; George Anderson Craig, Blairgowrie; John Lang Cunningham, Glasgow; John Mathew Dick, Edinburgh; Hugh Maclean Frater, B.L., Edinburgh; James Jamieson, Paisley; William Law, jun., Elgin; Joseph M'Nay, Dumfries; Laurence Henry Mathewson, Edinburgh; James Stirling Miller, Glasgow; Duncan Macgregor Milne, Glasgow; Janet Fleming Monteith, B.L., Glasgow; Forbes Morrison, Bothwell; John Richard Morton, Edinburgh; John Paterson, Glasgow; John Rae, Golspie; Frank Good Raitt, Arbroath; James Russell, Dundee; John Herbert Macbeth Somerville, Edinburgh; James Park Swannie, Aberdeen; William Lewis Weir, B.L., Glasgow; Alexander Gullan Young, Kinross; Joseph Howieson, B.L., Glasgow; William Young Smith, B.L., Glasgow.

The quarterly Examination in Law was held by the Examiners of Law Agents in Edinburgh last month, when 30 candidates presented themselves for examination. Twenty-four of these were examined in all the subjects, and 19 passed, and 6 graduates in law holding the degree of LL.B. or B.L. of the Scottish Universities were examined in Court Procedure, and all passed.

The Examiners at their meeting also granted certificates of exemption from the First Examination in General Knowledge to 5 applicants who have served in His Majesty's Military Forces during the late war, and who have satisfied the Examiners as to their general education for entering upon indentures of apprenticeship.

Incorporated Society of Law Agents in Scotland.—The annual meeting was held on 6th October in Greenock—Mr. Patrick Cooper, Aberdeen, presiding.

A welcome was extended by Provost Baxter, representing the community, also by Sheriff-Principal Irvine and Mr. R. S. Murray, Dean of Greenock Faculty of Procurators.

The Chairman said the year which had elapsed had been an active one. They had not, however, made all the progress they had desired. Three years ago he sketched out work to be done, but he must confess much of it still had to be done. Many new matters had cropped up, and had been disposed of. So they had not been idle.

In connection with the amalgamation of Scottish railways with English railways, the question had arisen of the effect of such amalgamation on Scottish stockholders. This question had been considered by a Joint Committee representing the principal legal societies, and the Committee had had prepared a memorial for presentation to the Secretary for Scotland, asking his co-operation in safeguarding the interests of Scottish stockholders. The draft memorial was only completed last week, and it had not yet been submitted. The Joint Committee thought it should not be made public until after it had been presented to the Secretary for Scotland. Another matter that had matured was the representations by the leading Scottish law societies to the Rent Restriction Act Committee. Their society had been asked by the others to prepare a statement of their views as to the continuance or otherwise of the Act. That statement had been made, and laid before the Committee as a joint statement. It was

thought better not to consider that statement at this meeting of the society.

Another matter not mentioned in the report, and which had been engaging the society's attention, was the service of English writs in Scotland. It would be remembered that in consequence of representation from Scotland, in which the society participated, certain rulings by the Supreme Court in England authorising service of writs to persons in Scotland were modified. He regretted to say that since then no further progress had been made. One could not help thinking that the Scottish law officers had not taken these matters seriously enough, or that they were not a match for the English ones. Each time English judges made a move to enlarge their jurisdiction over Scotland, the Scottish law officers were caught napping. Then there was an outcry, and public representations were made, and the English judges gave way a little bit. Each time the net result was an encroachment on the rights of the Scotsmen.

Mr. John Pattison, Paisley, and Mr. Alexander R. Prentice, Greenock, were unanimously elected President and Vice-President respectively.

The President, in taking the chair, said that as presently constituted, and as circumstances existed, this society was the broadest in its aims and objects of any of the law societies in Scotland. Proceeding, he said under the Solicitors Bill many useful provisions were incorporated, including provision for membership, and it was unfortunate that circumstances had prevented the bill from being proceeded with. So soon as there was any hope of Scottish legislation receiving consideration from Parliament, the bill ought to be rushed forward, either as framed, or, if thought expedient, stripped of whatever might be thought controversial matter, so that an easy passage might be procured for what was considered pressing and essential provisions.

In a reference to the Rent Restriction Act, the President said serious hardships had been created, and, if possible, these should now end. It was a difficult subject involving many considerations. The principle involved of practically giving fixity of tenure to occupants of dwelling-houses was new to our law, but the conditions under which it was granted were very pressing. There was no reason why such fixity of tenure should be made permanent. So long as there was fixity of tenure for occupants there must be restrictions on the right to call up mortgages.

Mr. R. Freer Myles, Forfar, proposed the following resolution:—
"That this society is of opinion that the law which secures to poor
"persons the privilege of suing *in forma pauperis* should be amended,
"so as to secure to the agents for the poor adequate remuneration
"for their services from Parish Councils in civil cases and from
"H.M. Exchequer in criminal cases, and that the matter be remitted
"to the Council to take such steps as they may think fit to have
"this amendment given effect to, and to report to a future meeting."

A suggestion that public funds be inserted instead of Parish Councils and the Exchequer was accepted by Mr. Myles, and the matter was left in the hands of the Council.

THE

SCOTTISH LAW REVIEW.

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SPECIAL TITLES AND GENERAL WILLS.—I.

THE very recent First Division case of *Drysdale*, 20th July, 1922, S.L.T. 556, is a good occasion to marshal the decisions; and, further, on the practical and constructive side, the case makes it imperative to reconsider the problem of draughtsmanship of wills with reference to the terms of what we may call the dispositive clause and the revocation clause. The position is really serious when it leads Lord Skerrington to say, "I am "satisfied that, owing to the laxity of our law, property often "passes from the dead to persons whom the owner did not "intend to favour at the time of his death." We approach the subject with no bias in the direction either of expanding the operation of a general will at the expense of special or particular titles or destinations, or *vice versa*. The intention of the testator is a much abused phrase, but, after all, there is such a thing, and it is the duty of the family solicitor to ascertain it and even, it may be, to aid in the formation of it. Manifestly it goes without saying that violence may be done to that intention just as easily, and as much, by sweeping into a general will property standing in various special forms, as by narrowing the will so that, while it shall still be general, it shall not be universal but framed in recognition of the brocard, *specialia derogant generalibus*. It may even be that the testator desires to draw distinctions among his special titles, for such titles owe their origin to many diverse causes. Personally we confess to having little sympathy with the taking of such titles at all, and we are inclined to include them in the same condemnation along with one particularly mischievous form of the thing, namely, conjunct destinations of heritable property to spouses and children, which have caused endless trouble, but now are, it is satisfactory to know, very much rarer than they used to be.

Among reasons which lead to these complications is a bastard kind of economy in different applications, as, for instance,

the desire to avoid or minimise (1) a lawyer's fee for a will by making one deed, or no deed at all, serve the double purpose of *inter vivos* title and *mortis causa* transfer; (2) income tax, by splitting up, or purporting to split up, the income among different members of the family, and so to multiply allowances and reliefs; and (3) death duties. These income tax and death duty schemes may work sometimes by avoidance and sometimes by evasion, but as to that two things may be said. The first is that not a few of the people concerned would not greatly care which of the two it was; and in the second place it is probably evasion in the cases with which we are concerned, for the assumption of the discussion is that the money or other property remained under the control of the settlor. We write from experience, for we have handled a moderately sized estate which the father of a family left in the most admired confusion owing to the combinations and permutations of schemes devised by him, and put in operation in his life-time, to avoid income tax and death duty, yet without parting with control. We regret to say that he scored on income tax, and that was not disturbed even *post mortem*, but, happily, he failed on death duties; indeed, he only narrowly, and by the efforts of others, escaped precipitating a family litigation which might easily have exhausted the bulk of all he left. The higher the taxation the greater the temptation, which is another argument against a capital levy.

The subject divides itself into three sections—

1. Is the asset in question within the testamentary capacity of the testator?

2. If so, the presumptions and rules established by case law on the question of competition between special destinations and titles on the one hand and a general will on the other hand.

3. The constructive question of the proper conveyancing form in which to carry out the testator's intention, whether it be that the general will shall prevail over the special destination or title, or *vice versa*.

I. The Testator's Power.

This question arises *ante omnia*, for if the testator had no testamentary power over the asset in question, there can be no competition between any general and special disposals by him of it. It may suffice to mention the following cases:—

1. *Delivery.*—The simplest case is a deposit receipt taken in the name of another and delivered; this, though extant at the donor's death, is beyond his control. Infeftment of self and another as trustees for a third party will suffice if the trust

is intimated to and accepted by the co-trustee; otherwise not (*Cameron*, 1907, S.C. 407, where the trusts were held to be revocable, but this was admittedly a narrow case, and may have to be reconsidered; see *Carmichael*, *infra*). When a man invests money on heritable security in the name of, say, a child, or of himself as trustee for the child, and records the bond, but does not intimate any donation or trust to the beneficiary, this has been held not to be delivery to the effect of perfecting any grant as between the donor and the beneficiary, but simply to protect the security as against the borrower; this, again, is the "narrow" case of *Cameron*, *supra*. When a *jus quæsitum* is properly created in favour of the third party, the grantor is bound (*Carmichael*, 1920, S.C. (H.L.) 195); this was the case of a policy effected by a father on his son's life.

2. *Contractual Destination.*—In *Perrett*, 1909, S.C. 522, husband and wife contributed equally the price of a villa, and they took the title to themselves "jointly and the survivor and "the heirs of the survivor." The husband predeceased, leaving a general will with a clause of revocation, but it was held that the widow took the whole house. Lord Dunedin said that the purchase and the title embodied—

> a contractual arrangement, where each took the chance of getting the half of the other, and accordingly I think that the property stands upon its own destination, and is not carried, and could not be carried, by any testament whatsoever. The moment that disposition was mutually delivered, as it was by the mere fact of taking the destination as between these two people, I do not think this destination could have been altered except by joint consent of the spouses. . . . The lady who survived takes the heritable property because she is the proprietrix under the terms of the conveyance.

3. *English Joint Tenancy.*—When property is vested in two or more persons simply and without any words of survivorship, the effect under English law is that the parties are joint tenants and not tenants in common, survivorship is implied, and not only so, but the joint tenancy, with its inherent survivorship quality, cannot be severed by will, but only *inter vivos* by deed. The result is that, no matter how expressly one of the parties may in his will purport to include his share of the property, that is ineffectual, though it appears that there is an exception in the case of what we call a mutual will, for that involves a contractual *inter vivos* element. But, apart from the special case of a mutual will, this is an instance in which the property (or share) belongs to the testator, and is absolutely

at his disposal as owner *inter vivos*, and yet he has no testamentary power over it. How shall this affect Scottish testators? Three cases may be referred to.

Connell, 1886, 13 R. 1175.—The testator took the titles to shares of English and Scottish companies, bought with his money, to himself and his wife (without reference to survivor); and later he made a general will with a clause of revocation. It was held that the special title to the Scottish shares was superseded by the will, but that the English shares were outside of the will and passed to the widow by force of the English rule. With reference to the English shares Lord Adam said—

> It appears to me that when Mr. Connell, in taking these shares, took them with this title, he must be taken to have known that the title would carry the shares to the survivor, and to have taken the title with that intention.

Dinwoodie, 1895, 23 R. 234.—A sum of £400 was deposited with a Colonial bank through its London office for a period of years at a fixed rate of interest. The deposit receipt was in name of a brother and sister, and bore that the money was repayable "to them or the survivor of them." The sister had provided £350 and the brother £50. Both depositors were domiciled in Scotland. Both died before the date of repayment, the brother surviving the sister. It was held by the Second Division that the document was to be treated as an ordinary bank deposit receipt; that as such it could not import a testamentary destination; and that the money still belonged to the estates of the depositors in their original proportions. The Court would not listen to the argument that the beneficial rights of the parties were affected by the law of England. They took the view that, as England was both the *locus contractus* and *locus solutionis*, the law of England would regulate all matters between the bank and the depositors, but that—

> in any question between the depositors themselves or their representatives Scots law must govern, seeing that the depositors are both Scots, that they were dealing with moveable estate situated in Scotland, and that they cannot be presumed to have transacted with each other on any other footing than that their respective rights should be determined by the only law with which they are supposed to be acquainted, that is, the law of their own country.

Drysdale, supra.—After the date of the general will the testator purchased, with his own money, two holdings of war stock, and the certificates were issued in the names of himself and his wife, without any reference to survivor. The real

question was whether the widow took one-half or the whole of those holdings. The parties elected not to aver or found on English law; on the contrary, they requested that the question be dealt with "as if the effect of the titles fell to be determined "according to the law of Scotland alone"; and "upon that "assumption" these stocks were divided equally between the widow and her husband's trustees.

The rule of English law presents a serious risk for an investor disposed to take these special titles and for, say, two sisters investing their money jointly. It may be that the result is greatly different according as an English or a Scottish company is selected; and, of course, with all respect to Lord Adam, such investors, and probably their advisers also, would be ignorant of the English rule. *Connell* appears to decide that English law will apply to English investments though the investors are Scottish. *Dinwoodie* related to a deposit receipt, which may make a difference, and there were specialties, apart from which it may be difficult to reconcile it with *Connell*. On this point *Drysdale* is no authority, as it was decided on an assumption, and, besides, the investment being by a Scotsman in British Government security, it is not here admitted that it was an English investment.

THE LIABILITIES OF TRUSTEES.*

Lord Scott Dickson, shortly before his death, gratified the members of the Scots Law Society by agreeing to their request that he should deliver the inaugural address on this occasion. Alas! that was not to be. He died in harness, looking back on a splendid record of personal achievement and public service, and looking forward, with interest, to fulfilling whatever demands the future might make upon him. Well! I think that is the end he would have wished for himself. For us there remain memories of his life and work that should prove helpful and stimulating. We who knew him think of him now as if he were calling us away from the easy downward road of indolence and self-indulgence and pointing us to the steep mountain road of strenuous effort and high endeavour the road which he himself took—winding uphill all the way, even to the very end. We recall the modesty and simplicity which characterised him—in spite of all his attainments and successes—the kindliness and sweetness of disposition which he invariably showed throughout the long years of strain and

* Inaugural Address by the Hon. Lord Ashmore to the Scots Law Society, Edinburgh, 6th November, 1922.

stress of forensic and political conflict—and the courage which enabled him to carry on, pleasantly and in good spirit, whatever difficulties and disappointments he had encountered by the way. Ah! gentlemen, these are pleasant memories; they are the rich legacy left by a good man in which all of us may share.

The passing, last year, of a new Trustee Act explains the choice which I have made of the subject-matter of my address. The Act referred to—The Trusts (Scotland) Act, 1921—consolidates and amends the law relating to trusts in this country. Both the consolidation and the amending were certainly required and had been long delayed. In 1868 Lord Westbury when giving judgment in a Scottish appeal to the House of Lords expressed the opinion that the doctrine of trusts rests on the same principles in Scotland and England and ought to be developed to the same extent in both systems of jurisprudence (*Fleming* v. *Howden*, 1868, 1 Sc. & D. App. 372 at pp. 381-2). The equal development which Lord Westbury regarded as appropriate in theory has not been realised in practice.

A consolidating Act applicable to the Trust Acts relating to England was carried through as far back as 1893, and England has generally led the way in new legislation for the purpose of relieving trustees from personal liability. So far as consolidation is concerned, however, the new Act undoubtedly now provides for Scotland a most convenient compendium of the varied legislation relating to trusts and trustees which previously was embodied in different statutes over a period of 60 years, Moreover, the new Act also makes amendments on and additions to the former legislation which are welcome. Nevertheless, even now, Scotland and England have not been put altogether on the same footing in the matter of freeing trustees from legal risks and responsibilities.

My object to-night accordingly is twofold:—In the first place I wish to explain how far the new legislation of 1921 is calculated to lessen the liabilities to which trustees were subjected prior to the passing of the Act; and, in the second place, I wish to call attention to certain disadvantages from which Scottish trustees, as compared with English trustees, have suffered in the past and from which they still continue to suffer.

I begin with the provision contained in sec. 17 of the Act of 1921 empowering a single trustee or any one or more of a body of trustees to apply to the Court for an order on the Accountant of Court to superintend the administration of the trust, so far as regards the investment of the trust funds

and the distribution thereof among the creditors and beneficiaries. According to the procedure previously in force under sec. 18 of the Judicial Factors Act of 1889 it was necessary that at least a quorum of the trustees should concur in making the application to the Court for the superintendence order (*Coulson*, 1920, S.C. 322); and the change introduced by the new Act may add to the utility of the provision. If the order contemplated by the Act is granted by the Court the Accountant is directed to examine and audit annually the accounts of the trustees and at any time, if he thinks fit, he can report to the Court upon any question that may arise in the administration of the estate and obtain directions from the Court thereanent.

In 1895 the Society of Writers to the Signet, in representing against the passing of the Public Trustee Bills then before Parliament, considered that the right conferred on trustees by sec. 18 of the Act of 1889 of securing the superintendence of the Accountant of Court would prove useful to Scottish trustees. The following passage in the report by the Committee on Bills of the Society describes the favourable opinion which they had formed of the power to obtain supervision and protection:—"In Scotland"—so reads the report—"the "position of private trustees has been greatly ameliorated by "the provision of sec. 18 of the Judicial Factors Act of 1889 "under which they may obtain from the Court of Session an "order on the Accountant of Court to superintend the admin- "istration of the estate so far as regards the investment and "distribution of the funds."

Then in the following year (1896) Lord President Robertson, commenting on the Act of 1889, said that it enabled the trustees acting under any private trust to obtain immunity for their acts on the important articles of investment and distribution (*Earl of Stairs Trustees*, 1896, 23 R. 1070); and, referring to a statement by Counsel to the effect that sec. 18 had been sparingly made use of, the Lord President remarked that the explanation must be either that trustees were not so timid of the responsibilities of administration as complaints of recent years had persuaded the Legislature or that they had not been informed of the remedy provided. "I am not aware," his Lordship added, "of any reason in regard to expense or "otherwise which should deter honest administrators of a "trust from coming under the supervision of the Accountant "of Court and thereby obtaining protection from that respon- "sibility about investments which has frightened so many men "away from the office of trustee."

The legislative effort of 1889, which the Society of Writers to the Signet and Lord President Robertson regarded as being important to Scottish trustees, has proved almost a complete failure. Thirty-three years have gone by and now in 1922 it must be confessed that the statutory provision of 1889, if known to trustees or their advisers, has been and still is almost completely ignored by them. The other day I examined the register kept at the office of the Accountant of Court and found that since 1889 the provision has been taken advantage of by only 41 trusts. That trustees and their advisers have not oftener sought to obtain immunity in this way may, I think, be explained to some extent at least by the original requirement that a quorum of the trustees must concur in the application; by the fact that the application must be made in the Court of Session and by the absence of any Act of Sederunt or definite rules of any kind which would enable trustees and their advisers to appreciate fully the conditions and consequences of committing the trust to the Accountant's supervision. Fortunately the new Act of 1921, like the original Act of 1889, empowers the Court of Session to pass Acts of Sederunt for carrying into effect the purposes of the Act, but any extension to the Sheriff Court of the power of committing a trust to official superintendence as regards investment and distribution and any consequent development of the duties of the Accountant of Court would apparently require to be made by Act of Parliament.

I proceed now to refer to what I regard as the most important of the new provisions of the Act of 1921—I mean the power conferred on the Court by sec. 32 to relieve trustees from personal liability. The section reads as follows:—"If "it appears to the Court that a trustee is or may be personally "liable for any breach of trust whether the transaction alleged "to be a breach of trust occurred before or after the passing "of this Act, but has acted honestly and reasonably and ought "fairly to be excused for the breach of trust then the Court "may relieve the trustee either wholly or partly from personal "liability for the same." How much equitable jurisdiction of some kind was required in Scotland is known best to those who are familiar with the series of trustee cases which have induced the judges who had to administer the law to remark on its harshness, which have led members of the legal profession to regard the judicial judgments as being hard on trustees and which without doubt must have produced in the minds of the unfortunate litigants themselves a rankling sense of injustice.

But while the statutory introduction into Scottish law of the power of dispensation will no doubt provide practical means of alleviating the strictness of the law as hitherto administered it does seem to offend against principle. The condition precedent of the right to the statutory relief is that there has been a breach of trust; but if a breach of trust has been committed and if loss results, it seems inequitable that there should be no remedy at law. While therefore the relief given to trustees from liability in the circumstances set forth in the statute is wholly satisfactory, the method of giving it cannot be regarded as well chosen.

Since August, 1921, when the new Act came into operation, I know of no reported case in Scotland in which the right to relief has been considered; but in England, in which country the Court has had power to relieve trustees since 1896, there have been several decisions some granting and some refusing relief. I must, therefore, resort to English cases to illustrate the practical working of the dispensing power, and, in the first place, I select a case in which the Court, acting under the analogous provision in the Act of 1896, relieved the trustees of liability—the case of *Perrins* v. *Bellamy* in 1898, 2 Ch. 521, 1899, 1 Ch. 797—one of the earliest cases on the subject. In that case the trustees had committed a breach of trust by selling leaseholds which they had no power to realise and thereby diminishing the income available to the liferentrix. The Court held that the trustees had brought themselves within the provisions of the Act and accordingly relieved them from personal liability. As showing the importance attached to what was then a new judicial power I shall quote some passages from the opinions of two of the distinguished Lord Justices who gave judgment in the Court of Appeal. Lord Justice Lindley, after referring to the provision in the English Act of 1896 as "that extremely beneficial enactment," said—"Before 1896 the plaintiff, the liferentrix, would have succeeded in making these unfortunate trustees liable for the "loss of income under the decisions then applicable to trustees "a very hard state of the law and one which shocked one's "sense of humanity and fairness." Lord Justice Rigby also contrasted the position of trustees before and after the Act of 1896—"I remember well," said his Lordship, "in my early "days cases in which there having been inadvertent breaches "of trust involving no moral blame the consequences were "visited upon the trustees . . . and it shocked one's "conscience. Now all that has been altered."

I shall take now a case in which the English Court refused

to relieve the trustees. In *Shaw* v. *Cates* (1909, 1 Ch. 389) the beneficiaries were suing the trustees to make good the loss sustained on a trust investment of £4400. The loan had been made by the trustees on the security of freehold house property and, before agreeing to make the advance, the trustees had obtained a valuation. The same solicitors, however, acted both for the trustees and the borrower and the valuer had been suggested by the borrower and was employed by the solicitors although their letter instructing the valuer bore to be written by them on behalf of their clients the trustees. Now in the English statute as in the Scottish statute it is enacted that no trustee lending money on property is to be chargeable with breach of duty by reason of the insufficiency of the security provided he conforms to certain conditions prescribed in the statute, one of these being that in making the loan the trustees should have acted on a report made by a competent valuer "instructed and employed independently of any owner of the "property." In defence to the action it was pleaded for the trustees that, assuming that there had been a breach of trust on their part, they had acted honestly and reasonably and ought fairly to be excused. Mr. Justice Parker, however, held that they had not acted reasonably and were not entitled to the statutory relief. Moreover, in more than one case in England the rule has been laid down that where the breach of trust consists in investing the trust funds upon insufficient security the requirements of the statute law as to obtaining an independent valuation and as to observing the prescribed proportion of two-thirds of the value of the security constitutes a *prima facie* standard by which reasonable conduct is to be judged.

I have indicated, very imperfectly no doubt, but as fully as the time permits, the nature and extent and the limitations of the dispensing power which the Legislature has conferred on the Court with the view of alleviating the position of trustees. I must go on now to refer to advantages which are at present possessed by trustees in England, but which have not been extended to trustees in Scotland, and to disadvantages from which Scottish trustees have suffered and still continue to suffer.

In the first place English trustees, in cases of doubt as to what course they ought to adopt, can safeguard themselves by taking out what is called an originating summons and in that way they obtain judicial guidance on any particular question arising in the administration of the trust. Moreover, the procedure referred to is simple and summary and

inexpensive and the trustees may be allowed expenses as between agent and client out of the trust estate. Consider what an advantage and what a comfort this would prove to men and women who are desirous of doing their duty as trustees but feel doubt as to how they ought to act and would like to be kept safe. They may have accepted office with no legal training and perhaps only a limited business experience and they may have no proper appreciation of the nature and degree of the care and diligence which the law expects of them or of the particular risks and liabilities to which the law subjects them from start to finish.

Now in Scotland the Court will not administer a trust and will not advise trustees on their administration. In the words of Lord President Inglis trustees are not entitled to come to the Court for advice as to how they ought to exercise their powers. They must exercise their own discretion and if they do so rightly they will be safe (*Berwick*, 1874, 2 R. 92; *Nobles Trustees*, 1912, S.C. 1230; *Dunbar's Trustees*, 1915, S.C. 860). Yes, but the anxiety of the trustees is that although they do what they think best it may afterwards be held that they had exercised their discretion wrongly and accordingly what trustees desire is judicial advice which will keep them safe. In many of the cases in which trustees have been held liable for breach of trust it appears that they had not expressly asked the advice of the trust solicitors and that no guidance or advice had been volunteered by the trust solicitors; while, in some cases, the trust solicitor had himself been personally implicated in the loss of the trust funds which the Court held the trustees liable to make good. Indeed trustees, if unfamiliar with the decisions of the Court, may perhaps, not unnaturally, consider that the trust solicitor, especially if he had acted for the truster in his lifetime, can be relied on spontaneously, on his own initiative, to advise the trustees and to keep them right—to see, for example as regards investments, that when the trust funds are lent through them the security is a proper trust security—to take care that the valuer is instructed independently of the borrower—to warn the trustees against yielding to the importunities of a liferenter and making speculative or hazardous loans to secure a high rate of interest—to advise that the trust funds, so far as not duly invested, must be kept pending investment in bank in name of the trustees or otherwise safe and under their own control; and, as regards the distribution of the estate, to explain that before the trustees pay any of the beneficiaries provision must be made not only for payment of all the ordinary

creditors but also for meeting the legal claims of the husband or wife and the children of the truster; and, generally, as regards all the varied details of trust administration, to stand by the trustees and to help them with all the professional skill and experience he possesses and with all the care and caution which have been developed in him by the teaching of the Law Courts and the lessons of business life.

I have said that trustees may be under the belief that they will be looked after and safeguarded by the trust solicitors in such ways as I have been specifying; and to the credit of the legal profession it has been found that in the vast majority —the overwhelming majority—of trusts the solicitors employed by the trustees do most faithfully and efficiently, on their own initiative, keep the trustees on safe and prudent lines in every branch and as regards every detail of the varied trust administration. Nevertheless every now and then the exceptional case does occur and when it does and the trustees, being without proper advice and guidance, inadvertently commit some breach of trust the trustees themselves must suffer. Thus it has been held, as regards the investment of the trust funds, that the trust solicitor has no legal obligation to volunteer advice to the trustees as to the sufficiency of the security; and that (apart from special circumstances) his only duty is that of a conveyancer, *i.e.*, to see that the title offered by the borrower is a good one and that from a conveyancing point of view the security is duly constituted (*Raes* v. *Meek*, 1888, 15 R. 1049, 16 R. (H.L.) 27; *Currors* v. *Walker's Trustees*, 1889, 16 R. 355; *Cleland* v. *Brownlie, Watson, & Beckett*, 1892, 20 R. 152).

In order to illustrate the risks which trustees in Scotland must run under the existing conditions I will, in the first place, mention (without entering into any details of the circumstances) some of the cases in which trustees have been held responsible. Trustees were held personally liable for money left in the hands of the trust solicitor who was himself one of the trustees (*Seton* v. *Dawson*, 1841, 4 D. 80).

Trustees were held bound, before dividing the estate in accordance with the truster's directions, to make provision for meeting a claim of legitim which would emerge if the truster's son reprobated the will (*Buik*, 1854, 17 D. 44).

Trustees who had been expressly authorised by the truster to continue to hold certain investments were held liable for loss on investments so retained by them in respect that they had failed to take means to satisfy themselves that these investments were reasonably safe and continued to be safe (*Thomson's Trustees*, 1890, 18 R. 24; *Scott's Trustees*, 1895,

23 R., at p. 59; *Boyd's Trustees*, 1908, S.C. 1147; *Henderson's Trustees*, 1900, 2 F. 1245).

"Trustees," said Lord President Inglis, "are just as little "entitled to continue the truster's imprudence as to commit "it themselves" (*Brownlie*, 1879, 6 R., p. 1236).

The Court has laid it down that it is the duty of trustees to press for payment of debts outstanding and failing payment within a reasonable time to enforce payment by taking legal proceedings—unless indeed they have a well-founded belief that such proceedings would prove fruitless—moreover, the burden of proving the grounds of such belief lies on the trustees (*Forman* v. *Burns*, 1853, 15 D. 362; *In re Brogden*, 1888, 38 Ch. 546).

Trustees who had not thought that the truster's business had any realisable goodwill were held liable 10 years after the truster's death for not having sold the goodwill (*Donald* v. *Hodgart*, 1893, 21 R. 246).

I have mentioned these decisions, as I explained I would, without any details as to the circumstances but, as I think it important to give some fuller and clearer indication of the grounds on which it has been thought that trustees in Scotland are subjected to unreasonable risks, I will now narrate, as concisely as possible, the material facts in two well-known cases.

I take first the case of *Wyman* v. *Paterson*, 1900, 2 F. (H.L.) 37. The general nature and result of the decision by the House of Lords in that case, stated in a sentence, was that trustees are bound to keep the trust funds invested or placed in their own names so that they cannot be uplifted without the authority of the trustees. The circumstances were as follows:—A bond for £3000 held by the trustees was paid up in July, 1887. The money was received by the law agent of the trustees, and was retained by him with a view to its re-investment. Between July and December, although no regular meeting was held, two of the trustees called more than once at the agent's office to ask what progress was being made in the way of securing a new investment. The agent's reply was "that he was making inquiries, but had not heard of any "investment that he felt justified in recommending." At a regular meeting of the trustees held on 19th December, the agent reported that he had not yet been successful in finding another investment. One of the trustees then remarked, "The "money will be on deposit receipt?" The agent said "Yes." "Will you be good enough to produce the deposit "receipt?" asked the trustee. The agent went to the speak-

ing tube and then said to the trustee, "My cashier is out, "and he has the deposit receipt, but we will send it round and "show it to the trustees." (I have taken these details as to what passed at the meetings from the print of the evidence in the Session Papers.) Two days later (viz., on 21st December) the agent sent a clerk to the trustees with a deposit receipt for £3000 for inspection. This receipt, however, bore date 20th December—the day after the meeting—and was in name of the agent for behoof of the trustees. The trustees did not notice *the date* of the deposit receipt. What they were struck by, and what they disapproved of, was that the receipt was in the agent's name, and they sent him word to have it put in their own names. On 23rd December one of the trustees called at the agent's office to see if the trustees' instructions had been carried out, but was told that owing to a serious accident, the agent had been unable to attend to business. Between 23rd December and 18th January this trustee called repeatedly at the agent's office, but was met on each occasion with the explanation that the agent was still too ill to attend to business. On 18th January the agent cashed the deposit receipt, and appropriated the proceeds to his own use. Prior to that date the trustees had no doubt of the agent's solvency or integrity. The trust settlement bore an express clause of immunity, empowering the trustees to appoint a factor, and declaring that they should not be liable for his intromissions, "Neither shall they be liable for any agent, who, in trans- "acting the business of this trust, shall receive any part of "my estate into his hands."

Now, let us see how the trustees were dealt with by the Court. In an action of damages brought by a beneficiary against them, the Lord Ordinary (Lord Low) assoilzied them, and the First Division unanimously adhered; but on an appeal to the House of Lords the decision of the Lord Ordinary and the Inner House was reversed, and the trustees were found liable. Lord Morris dissented, and in doing so made a strong protest—"In my opinion," he said, "on the facts of the case, "a decision against the trustees would be a draconic decision, "and would be an additional terror to any honest and solvent "person acting as a trustee."

I take now as my second example the case of the *Heritable Securities Investment Association* v. *Millar's Trustees*, 1893, 20 R. 675, to show how strictly the law enforces the rule that trustees must settle all debts of which they have knowledge before they make any payments to the legatees or beneficiaries. The Heritable Association held personal bonds by the deceased

for £75,000, secured by an absolute conveyance of valuable heritable property. Shortly after the deceased's death part of the property was sold, and the Heritable Association, on receiving a payment to account of £25,000, disburdened the part sold, and left the balance of their loan, viz., £50,000 outstanding secured by the remainder of the property, which at that time was considered sufficient for the purpose. Things remained in this position for seven or eight years after the death of the testator, by which time the subjects retained in security had greatly deteriorated in value. Six or seven years later, that is to say about fifteen years after the death of the testator, the Heritable Association raised an action against the trustees for payment of trust funds, amounting to over £11,000, which they alleged had been improperly paid by the trustees out of the income to the truster's widow and family as beneficiaries.

The Lord Ordinary (Lord Wellwood) assoilzied the trustees from the claim. He held, as the result of the evidence, that it had been proved that the payments out of income to the widow and children had been made by the trustees in the honest belief that the trust estate was solvent, and that the debt due to the Association was sufficiently provided for. But the First Division of the Court of Session by a majority reversed Lord Wellwood's decision. Lord M'Laren dissented from the judgment of the Division on the broad ground that there was no personal obligation on the trustees for the debts due by the deceased to his creditors, that the obligation of the trustees was merely to make the deceased's estate forthcoming in a due course of administration, and that in the case under consideration that obligation had been duly fulfilled. Let me now give the *ipsissima verba* of the judge, whose name will ever be associated with the Scottish law relating to wills and trusts. Here are the concluding sentences of his opinion—

"I may say with the greatest deference and respect, and "I do think that the rule which your lordships are laying "down is one that will operate with the most cruel hardships "and injustice to families, because it means this, that "wherever there are outstanding obligations—and nothing is "more common in trust management, where the testator was "a merchant or manufacturer, than outstanding obligations— "the whole estate, heritable and moveable, is to be laid under "an interdict, and not one penny can be paid to the family "of the testator, because possibly at some future period in- "vestments which appeared ample may fail, and the creditors "will hold the trustees responsible. I am quite sure that if

"I had been consulted at the bar in such a case as this, I "would, without a moment's hesitation, have advised the trus- "tees not only that it was permissible but that it was their "positive duty to make these payments to the beneficiaries. "I should have so acted myself as a trustee, and I may say "that I am not sure that I would not do so again if the occasion "should occur."

With regard to the various cases to which I have been referring the following comments and queries suggest themselves. No doubt if trustees got to know of these cases or other cases like them their eyes might be opened to what the law expects of them. But under existing conditions how is the trustee, who is not a lawyer, to get to know what the Court from time to come has laid down regarding the duties of trustees? How, for example, is he to obtain the benefit of the object-lessons afforded by the decisions? And yet when the question of his alleged breach of trust, or negligence, is being tried, he may not escape liability by proving that he did resolutely mean, and did anxiously try to do his duty, if at the same time he has to admit that he did not know the duty and that he failed to perform it.

In view of cases and decisions of the kind to which I have been referring it is not surprising that again and again over a long period of years the want of some means of safeguarding trustees has been adversely commented on. In 1890 Lord President Inglis, in the course of giving his opinion in an action against a trustee, spoke as follows:—"Your lordships "are well aware how little sympathy I have with the rule "now established by judgment of the House of Lords that "the law requires of a gratuitous trustee the same degree of "diligence that a man of ordinary prudence would exercise "in the management of his own affairs. As a definition of "duty I think the rule is vague and inadequate and in its "application it has been found to be often severe and unjust. "For this evil I hope some legislative remedy will be found" (*Carruthers* v. *Cairns*, 1890, 17 R. 769, at p. 780).

In 1895 that great lawyer and judge, Lord Watson, when giving evidence in an inquiry before a Select Committee on the Administration of Trusts, expressed a clear opinion that the Courts in Scotland ought to give more assistance to trustees in the course of their administration than it was possible for those trustees to obtain under the law and practice then existing, and he added that it would be a great advantage to trustees in Scotland to have the right to approach the Court to the same extent as was enjoyed by an English trustee (*Report-Trusts Administration*, 1895, p. 162).

Then in 1918 Lord Skerrington referred to the position of Scottish trustees as follows:—"It has been said and the saying correctly represents the law of Scotland that the Court will not advise trustees. If trustees possess a power, however difficult and delicate may be its exercise, however serious the responsibility which they may incur, by either exercising it or refusing to exercise it, the Court will not lift a finger to help them; it declines to advise them. I should have thought," added his Lordship, "that a primary purpose of a Supreme Court of Equity was to assist trustees and beneficiaries in circumstances of difficulty by aiding them in the exercise of powers which already belong to them in circumstances where such assistance was desirable" (*Hall's Trustees* v. *M'Arthur*, 1918, S.C. 646, at p. 654).

These are weighty opinions; and they go far because of their intrinsic importance to demonstrate the necessity for some radical change in the comparatively unsatisfactorily conditions under which trustees in this country must discharge their administrative duties.

I think that I have now sufficiently indicated the difficulties in which trustees may be placed in the course of their administration of a Scottish trust—difficulties which in England can be solved with ease and economy by securing judicial advice and guidance under an originating summons. So far as regards this matter, however, the Act of 1921 leaves Scottish law and procedure as they were.

Another means of safeguarding trustees has been provided in England under the Judicial Trustees Act of 1896 and the relative Judicial Trustee Rules of 1897. The statute provides for the appointment of judicial trustees on the application of a truster or intending truster or of any trustee or any beneficiary; and as regards the trustees any fit or proper person suggested in the application may be appointed or if the Court is not satisfied of the fitness of the person suggested then an official of the Court may be appointed. The judicial trustee, if not an official of Court, must give security unless the Court dispenses with it; but any premium payable by a judicial trustee to guarantee his intromissions may be paid out of the trust estate if the Court so directs. The whole procedure is of the simplest kind. The application is by originating summons in the Chancery Division or by petition in the County Court as regards trusts not exceeding £500 in value. The judicial trustee may at any time request the Court to give him directions as to the trust administration by letter addressed to the officer of Court without any further formality and the

Court may give directions by letter signed by the officer also informally. The trust funds, so far as not invested, are kept in bank and the deeds and documents are retained in the custody of the judicial trustee. The trust accounts are made up and audited annually. The judicial trustee may resign office and the management of the judicial trustee may be discontinued by the Court on the application of any one interested. This procedure of judicial trustee administration was a new departure in English law in 1896 and it was undoubtedly suggested and founded on the Scottish system of administration by judicial factors. As has been indicated, however, by the details which I have given, the English judicial trustee administration represents developments of the judicial factors administration which at least in certain respects might, as I think, be advantageously adopted and applied in Scotland.

I have been calling attention to what I regard as defects in one small part of our system of law. I realise, however, that the development of the system towards perfection represents a gradual process of evolution which never ends. The development is slow; it waits on the formation of opinion on the part of the legal profession and from time to time, by reason of the force and concentration of that opinion, some definite advance is at last realised. To-night I am addressing, and hoping to interest, a tribunal of youth. Amongst its members how many will have the spirit to do their bit, consistently and courageously, towards making the law of Scotland give ever fuller expression to the eternal principles of justice and fairness? One more thought: I am an old President of the Scots Law Society; I have pleasant recollections of my associations with it; and I am glad to speak to the men who are now carrying on its traditions. What should be my wish for them? This, I think: that when they come to my age they may be able to feel and say truthfully and gratefully, what I myself am thinking and saying now—"Sweet is the "memory of past labours!"

TAXATION OF BONUS SHARES—CAPITAL OR INCOME.

This question is apparently of world-wide importance. It has now been the subject of decision in this country, Australia, South Africa and the United States.

In *Bouch* v. *Sproule* (1887), 12 A.C., the House of Lords decided that in the case of a company in which an option was given to shareholders to take a dividend by way of a cash payment or by way of fully paid-up shares of a considerably

greater value, such accepted shares constituted capital and not income in a question between the tenant for life and the remainder man.

The next case is that of the *Swan Brewery, Limited* v. *The King* (1914), A.C. 231, which was decided by the Privy Council on appeal from Western Australia. The question there was whether—to use the term which seems to be general in the Dominions as well as in the United States—a stock-dividend resulting from a capitalisation of accumulated profits and from a corresponding increase of capital, constituted a dividend within the meaning of the Western Australia Dividend Duties Acts, which described a dividend as being "every dividend, profit, "advantage or gain intended to be paid or credited to or distributed "among any members or directors of any company except the "salary or ordinary remuneration of directors." The judges who heard the appeal were Lords Moulton, Parker and Sumner. The latter delivered the judgment of the Court to the effect that these stock dividends were an advantage and thus came within the scope of the Act.

It will be convenient to discuss the reasons for this conclusion when the other judgments are examined.

The last of these leading cases was that of the *Inland Revenue Commissioner* v. *Blott, infra,* where the question in issue was whether stock dividends were income subject to super-tax. The special commissioners decided that in the hands of the shareholders they were not income but capital, and their decision was upheld in the various appeals at the instance of the inland revenue commissioner, firstly by Rowlatt, J. (1920), L.J. K.B. 58, then by the Court of Appeal consisting of Lord Sterndale, Warrington, L.J., and Scrutton, L.J. (1920), L.J. K.B. 677, and lastly by the House of Lords by a majority of three to two, namely, Lords Haldane, Finlay and Cave as against Lords Dunedin and Sumner (1921), L.J. K.B. 1028.

In *Blott's* case all the judges, with the exception of the two dissentients in the House of Lords, considered that the principles adopted in *Sproule's* case, *supra,* though the question in issue was between a tenant for life and the remainder man, were applicable in determining whether stock dividends were capital or income within the meaning of the Income Tax Acts in England. Four Lords delivered opinions in *Sproule's* case; two of them, Lords Herschell and Watson stating in emphatic terms that the company had converted into capital the accumulated profits in the shape of the bonus shares which constituted the increase of share capital, and that what the shareholders received was not profits but capital represented by the stock dividend,

Lord Fitzgerald stated that the directors of the company, acting within their powers, had so dealt with the extra allowance or bonus made to the shareholders out of accumulated profits and reserve fund as to make that bonus capital and not income. Lord Bramwell, whilst not expressing the same conclusion directly, considered that by a valid agreement undivided profits could be converted into capital.

None of the judgments indicates that the decision depended in any way upon the intention of the testator or the special relationship between the tenant for life and the remainder man, and three out of the four lords clearly considered the question as one of company law.

The most important of the dissentient judgments in *Blott's* case is that delivered by Lord Sumner, who held that, as the company could not purchase its own shares or make a present of them to shareholders, the only way in which the transaction could be validated was by considering that the company paid a dividend to the shareholders out of the profits, and that the shareholders then paid it back to the company in exchange for its shares; these reciprocal payments he held none the less to have taken place, that they would be presented only by book entries and not any direct delivery of value. The declaration of the bonus dividend he deemed to constitute a debt due by the company to the shareholders; the allotment of shares its satisfaction. Lord Dunedin expressed a similar opinion. The other judges of the three Courts all adopted views explicitly or impliedly in opposition to these opinions, and held that the machinery employed for converting the accumulated profits into capital did not affect the substantial nature of the transaction that there never was any intention to pay, and much less any actual payment of, dividends out of profits to shareholders, and that it was fully within the competence of the company to thus increase its capital, and dispose of the new shares by the direct process of capitalisation and issue. Lord Haldane devoted a large portion of his judgment to the consideration of this question.

Most of the judges in *Blottt's* case pointed out that the decision in the Swan Brewery case (1914), A.C. 231, related to and only required the construction of a special statute, but they expressed dissent from some of the reasoning which was employed. In that case Lord Sumner, at the commencement of his judgment, said—"In ordinary language the new shares would not be called "a dividend, nor would the allotment of them be the distribution "of a dividend. The question in issue is whether or not the "new shares were a dividend under the Act above-mentioned. ". . . The new shares were intended to be and were distri-

" buted among the shareholders; they were intended to be and " doubtless are advantages to the allottees."

This was all that was necessary for the decision of the case, but Lord Sumner then proceeded to deal with the arguments used in the appeal, and undoubtedly his statements are inconsistent with the decision in *Sproule's* case as interpreted by eight of the judges, as well as by the text-books dealing with the company law. He concurred in the view of Parker, C.J., in the lower Court that virtually the effect of what was done was payment by the company of these accumulated profits to, and repayment of the same amount by, the shareholders in satisfaction of their liability on the share. He held that in business and in law there were these two transactions, though it was true that in one sense it was all one transaction.

In *Blott's* case Lord Sumner adhered to and developed this line of reasoning, and both he and Lord Dunedin endeavoured to distinguish *Blott's* case from *Sproule's* case.

In America the Supreme Court has decided in two most important cases that bonus dividends are not income. The first was *Towne* v. *Eisner* (245 U.S. 418; also in L.R.A. (1918) D. 254), in which Holmes, J., delivered the judgment.

The second was *Eisner* v. *Macomber* (252 U.S. 198; also in 9 A.L.R. (1920) 1570, in which two judges held that stock dividends were income and the other seven held that they were capital. The whole matter was fully reconsidered in the latter case, and it will be convenient to refer to some of the conclusions.

The interest of a shareholder in a company is a capital interest; it is represented by share certificates; an increase in the number of his share certificates, so long as it represents the same interest, does not affect the fact that the share certificates represents just the same amount of capital as before; the only result is that there is a consequent dilution of the value of each share. A stock dividend shows that the company's accumulated profits have been capitalised instead of being distributed or retained as a surplus available for distribution; far from being a realisation of profits, it tends rather to postpone such realisations, and denies the shareholder any present participation in the profits.

The essential and controlling fact is that the stockholder has received nothing out of the assets of the company for his separate use and benefit; the profits in question remain the property of the company, subject to business risks which wipe out the whole investment. Having regard to the very truth of the matter and not to form, he has received nothing that answers the definition of income.

Lately the South African Courts have had occasion to consider the question, and in *Inland Revenue* v. *Collins* (Transvaal Pro-

vincial Division of the Supreme Court, June 1922) the decision has also gone against the Crown, that is, that firms' bonus are not taxable, being capital. An appeal to the Privy Council is, we understand, pending; though unless there are in the statutes of the Transvaal something which can distinguish the case from the others referred to, an appeal would not appear to have much prospect of success.

THE PLEADER.

The case of *Danish Dairy Company* v. *Gillespie*, 1922, 59 S.L.R. 530, is important in several respects. *First*, with regard to a law agent's authority to bind his client to a lease of heritable subjects, it is emphatically reiterated that instructions to negotiate terms of lease do not go beyond negotiation; they do not imply authority to make a binding agreement; there is no presumption that a law agent has such a power, and the onus is on the party setting up a lease entered into by a law agent on behalf of the proprietor to show that the former had authority not merely to negotiate, but also to contract. In the case referred to this onus was not discharged. *Second*, with reference to the principle of *rei interventus*, which was appealed to in completion of the lease, the element of knowledge in the other party was deemed essential. It was urged as *rei interventus* that the tenant in reliance on the ostensibly completed lease refrained from seeking other premises. But while granting that absention from an act might form the material for *rei interventus* as well as a positive act, yet the abstention or the positive act must be known to and permitted by the other party if he is to be precluded from taking advantage of an imperfection in the constitution of the contract or obligation. In this connection the following passage from the opinion of Lord Shand in *Gardner* v. *Lucas*, 1878, 5 R. 638, was approved—"The rule is that such acts can only receive "effect as *rei interventus* as are important in their character "and are either known to the other party or must necessarily "be held to have been in the contemplation of that party when "he entered into the agreement—actings which are in the "proper pursuance of the agreement and which the other "party to the agreement would naturally expect should take "place in pursuance of it."

With regard to the first point, we may recall the general rule that a principal is bound, *quoad* third parties, by the actings of his agent within the ostensible scope of the agent's authority, notwithstanding that he may have given secret instructions to the agent limiting his sphere of authority. But where, as in this

case, there is a definite rule of law that an agent has not power to bind his principal, the third party is held certiorated of that circumstance, and cannot plead the general rule.

It is satisfactory that in *Chalmers* v. *Morton*, 1922, 59 S.L.R. 500, the Justiciary Court did not follow the construction which apparently obtains in England that when warranty is pleaded in defence to a milk prosecution, the accused, in order to establish such a defence, must show that he had stipulated for a warranty as part of the contract for supply of the milk. It was, on the contrary, held that production of a warranty in sufficiently clear terms was sufficient. The principle of the English cases would seem to originate in the doctrine of warranty peculiar to the law of England, that a warranty in England without consideration is of no effect.

All lawyers are well aware how troublesome a question may arise when a person takes an investment in special terms, *e.g.*, in favour of himself and his wife and/or children, and subsequently executes a general settlement conveying his whole estate to trustees. In this connection the point raised but not settled in *Drysdale's Trustees* v. *Drysdale*, 1922, S.L.T. 561, should be kept in view. The question there was as to the effect of a clause of revocation contained in the general disposition on the prior special destination. The Lord President and Lord Mackenzie desired to reserve opinion on that important general question, but Lord Skerrington made the following pertinent observations:—"Though the decisions are probably reconcil-"able, the *dicta* of the judges seem to me to leave the law in a "state of painful uncertainty. Speaking only for myself as "to a matter on which your lordships may possibly hold a "different opinion, I think that the revocation clause in "Mr. Drysdale's will was sufficient to revoke the destination "in the titles. The clause was as follows:—'I revoke all "'former testamentary writings made by me.' I cannot read "this clause as limited to writings signed by the testator and "in the form of a proper will or testament. There are many "writings other than wills or testaments which the law of "Scotland (unfortunately, as I think) allows to have a testa-"mentary effect, *e.g.*, the revocable and testamentary clauses "which conveyancers insist upon introducing into marriage "contracts, and the large class of cases in which it has been "thought 'commodious,' as Lord Kames phrased it in *Hill's* "case (1755, M. 11580), that a writing signed by a third party "and not by the owner should regulate the succession to a "portion of his estate although it did not create a special "destination in the proper and accepted sense of that term.

"I am satisfied that owing to the laxity of our law, property "often passes from the dead to persons whom the owner did "not intend to favour at the time of his death. The evil "would be aggravated if anomalous wills in the form of "personal bonds, stock, certificates, &c., were held to be "exempted from a clause revoking previous testamentary "writings upon the technical ground that a title is something "different from a will, and that it is not under the hand of "the owner of the property." Certainly the question whether a special destination is to receive effect in competition with a general settlement would be much simplified, if soluble by the presence or absence of a revocation clause in the latter.

Literature.

The Poetry of Law. Valedictory Address to the Edinburgh Juridical Society. Alexander Moncrieff, K.C. Edinburgh: William Hodge & Co., Ltd. (1s. net.)

The Juridical Society of Edinburgh is a venerable institution. The address, which this very distinguished member of the Scottish bar gave to the Society recently on his retiral from the presidency, was worthy of the Society. Perhaps, to the prosaic it will not appeal, and, indeed, it is not for such. But it is delightful to find that the "soul of music" pervades the skilled lawyer. To the seer with the insight of Browning, there is still romance to be found in law. One can see that Mr. Moncrieff hates the telephone and all the other late inventions of science. But, nevertheless, he sees that through all progress "one increasing purpose runs." His wonderful "Fantasia" will repay its second reading. No finer gift has been placed for a long time on the altar of Themis by any worshipper than this fragrant bouquet from the very Gardens of Iran.

Company Liquidation Law and Practice. By G. W. Wilton, K.C. Edinburgh: William Hodge & Co., Ltd. (36s. net.)

By the publication of his Company Liquidation Mr. Wilton, for the third time in ten years, has contributed a notable addition to the library of company law.

The subject is practically self-contained, and makes a wider appeal than the purely legal and technical branches of company law; for liquidation is the province not less of the accountant than of the lawyer. These features are reflected in the scheme of the work, in which the author, instead of slavishly following the order of the Act, has analysed the subject afresh, and has presented in the case of each of the three methods of winding up a detailed and orderly exposition of the steps which have

to be followed from the initial resolution or order of the Court down to the final dissolution of the company. We feel confident that Mr. Wilton's adoption of this line will be endorsed by the approval of all concerned in the practical business of conducting, and advising as to the conduct of, liquidations. For the student or the business man, interested only in broad principles, Mr. Wilton has made special provision by the judicious use of heavy type rubrics in which the purport of paragraphs or pages of exposition is epitomised in pithy aphorisms; while the specialist, in search of guidance upon some peculiar difficulty, will find an exhaustive but highly condensed review of Scottish and English authorities, in the accuracy and completeness of which he may confidently rest assured. An appendix containing the liquidation sections of the Act, with marginal references to the text, and a copious index extending to 80 pages of print, will materially facilitate consultation of the book as a work of reference.

This book is designed to assist the actual practitioner, and the measure of its success can only be satisfactorily tested by actual practice: but Mr. Wilton's established reputation as a company lawyer and a writer amply warrants the prediction that his object in his latest work will be fully attained. To the practising accountant in particular we would recommend it as supplying a want which is adequately met by no other publication in England or Scotland.

Obituary.

At Cambuslang, on 8th November, Mr. John Stirling Nisbet, of Messrs. Walker & Nisbet, solicitors, Glasgow.

At Forres, on 24th November, Mr. Robert Urquhart, M.V.O., in his seventy-eighth year. Mr. Urquhart was joint town-clerk of Forres, and held a number of other public appointments.

At Glasgow, on 27th November, Mr. John MacLachlan, solicitor. Mr. MacLachlan was admitted a member of the Faculty of Procurators in Glasgow in 1887.

At Dunbar, on 28th November, Mr. John Henry Sinclair, solicitor. For many years Mr. Sinclair held the office of burgh prosecutor for Dunbar.

Notes from Edinburgh.

Parliament House, 30*th November*, 1922.

As was generally anticipated, the vacancy on the bench caused by Lord Mackenzie's resignation for health reasons was filled by the appointment of Mr. Charles D. Murray, K.C., C.M.G., the ex-Lord Advocate, and no more popular selection could

have been made. Although he was slow in coming to the front as a junior counsel after admission in 1889, yet once he had got a secure footing Mr. C. D. Murray's success was remarkable, and later, as a senior, he had more work offered to him than any one man could hope to undertake; and his practice had been easily the largest of the leaders of the bar when, in 1915, he stopped legal work to engage in service in the War Department. Being then over military age, the sacrifice he made was a genuine and patriotic one. The first military task given him was the organisation of Scottish Volunteer forces, with rather unpromising material to work on, and later he was appointed Inspector of Recruiting with jurisdiction over the Military Tribunals in Scotland, an office in which he was succeeded by his present judicial colleague, Lord Constable. Next he was, with the rank of lieut.-colonel, sent across the sea as one of the members of the recruiting mission to Canada and the United States, where many British subjects were got as recruits for our Army. His final Government war service was in the post of Director of National Service in Scotland, and at the close of hostilities his meritorious services were recognised by the bestowal of the C.M.G. Order on him. Besides being a good all-round lawyer, Lord Murray excels in shipping work, his experience of maritime causes of all sorts having been very large in the days when shipping cases were more numerous than they are now; and, doubtless, he will be much resorted to as judge in shipping and mercantile causes. He had the good fortune to have his office experience with the well-known Leith firm, Messrs. Boyd, Jameson & Kelly, W.S. (now Boyd, Jameson & Young), who have handled maritime and mercantile cases in great numbers, and that firm can claim further credit for having had both Lord Salvesen and Lord Hunter under their charge for office training.

It will be remembered that when Mr. C. D. Murray, as a supporter of Mr. Lloyd George, felt constrained to hand in his resignation as Lord Advocate to Mr. Bonar Law, he was succeeded in office by the then Solicitor-General, and that, later, the vacated post of Solicitor-General was given to Mr. David P. Fleming, K.C., the second in seniority of the four Advocates-Depute. Since then the General Election has been fought, and in the new Government the Lord Advocate is the Right Hon. William Watson, K.C., Mr. C. D. Murray's successor, and Mr. D. P. Fleming, K.C., is Solicitor-General, and neither has a seat in Parliament. The Lord Advocate had the unfortunate experience of losing the contest in Galloway, and the Solicitor-General, while willing to contest a seat,

found that another candidate had been brought forward, and his candidature went no further. There is thus at the present time no official representative of Scotland in the House of Commons, for the Secretary for Scotland is in the House of Lords. A seat for the Lord Advocate will, doubtless, be found at an early date, though this may not be easy. Meantime it is so far satisfactory to know that Scotland has six representatives of the bar in the House of Commons, these being Sir Robert Horne, K.C., Mr. J. Duncan Millar, K.C., Mr. George A. Clark Hutchison, K.C., Mr. F. C. Thomson, Mr. A. N. Skelton, and Mr. P. J. Ford.

With the promotion of Mr. D. P. Fleming to the status of Solicitor-General a vacancy among the Advocates-Depute required to be filled, and Mr. Alexander Maitland has received the appointment. The four Advocates-Depute now in office are Mr. A. M. MacRobert, K.C., Mr. J. C. Fenton, Lord Kinross, and Mr. A. Maitland. Mr. J. M. Hunter now becomes Extra Advocate-Depute, and the deputeship for the Sheriff Courts has been given to Mr. A. C. Black. Mr. Maitland was admitted to the Faculty in 1903, and Mr. Hunter and Mr. Black were both admitted in 1904.

A decision given recently by the Second Division as to the application of the law of the Edict of the illustrious but unknown Roman Praetor, known shortly as "*Nautæ, caupones, stabularii,*" to the question of liability on the part of a modern stable-keeper (as distinguished from an inn-keeper-stabler) for damage suffered by the owner of a horse put into his custody, is a decision which will have far-reaching and possibly unlooked-for results, though, of course, expounders of the law have nothing to do with results, their functions being to administer the law as they find it. The decision concerns an action brought by a farmer against a stable-keeper for the value of a horse which had to be destroyed because of injuries alleged to have been received by the animal while in the custody of the defender. The case came on appeal from a Sheriff Court in the north, the Sheriff having held that the Edict applied, and that the *onus* was on the stable-keeper to prove that the injuries were due to the act of God, and that defender having failed to discharge the *onus*, the pursuer must succeed, and decree was given for pursuer accordingly. This judgment was affirmed by the Second Division. The circumstances were these:—The pursuer paid the stabler the sum of £2 yearly for the stabling of his horse on market days. On market days accommodation was much in demand, and in an open, roomy stall the horse was placed along with that of

another farmer, the latter animal having an excellent character for quietness, and in fact the two steeds had been used to hob-nob together in similar circumstances without trouble arising. Nothing was proved against the stable companion nor against the ostler, who, unfortunately, died before the proof; but on claiming his horse the pursuer found it had gone lame, with no external signs of violence, and, on the advice of a veterinary surgeon, the animal was destroyed. The proof no doubt suggested that the placing of two horses in one stall was an unsafe practice under certain circumstances, but it was shown to have been a common practice. According to the decision, that mattered nothing one way or the other, for nothing was shown to have happened by the double occupancy of the stall. It was the application of the law of the Edict which decided the case, the stable-keeper being unable to put the act of God forward as explaining how the injuries were caused. Put the horse in a stall by itself, and if injured in any way the stable-keeper would have been held liable. Scared by a rat, or a wasp, or even annoyed by a fly or tortured by colic, the horse might have damaged itself by rearing and plunging in confined space. The stable-keeper might suggest that any one of these things represented the act of God. Probably he would be met with the retort that it was up to him to keep his stable clear of rats, wasps, and flies, and to refuse refuge to a colic-suffering horse.

The decision will surely have one result, viz., that the charges for the baiting and stabling of horses will be raised very considerably, and farmers will be the first to complain. Stable-keepers may protect themselves by insurance, but the premiums will undoubtedly be heavy, and casual clients will be charged accordingly. The liability of garage-keepers, if it comes to be tested in manner similar to the present case, ought to present an interesting problem, for, though it is true that the unidentified Praetor was not far-seeing enough to provide for the case of garagers, he would most assuredly have included them in his Edict had automobiles been in use in his day.

While complaints are rife as to the exorbitant charges now being imposed on Court proceedings, especially the charge per hour for hearings and the dues on initiating actions, there has been no great decrease in the amount of business brought into the Outer House during November. There were 96 new summonses called during the month, and, deducting from these 26 consistorial causes, there remain 70 new actions, the majority of which might competently have been taken to Sheriff

Courts. It is too early yet to say how the increased charges are going to work out, but 70 new actions is not at all bad for a month nowadays. The figures for the Inner House, unhappily, seem to be on the decline, for only 22 new cases went to the two Divisions during November.

The 96 causes called in the Outer House are divided among the five Lords Ordinary as follows:—Lord Ashmore has 43, and 13 are divorces; Lord Morison has 20, there being 6 divorces; Lord Sands (succeeded by Lord Murray) has 16, whereof 5 are divorces; Lord Constable has 9, with no consistorial cases among them; and Lord Blackburn has 8, there being 2 divorces.

The 22 causes taken to the Inner House are divided unequally between the two Divisions, 16 going to the First Division and 6 to the Second Division. The 16 in the First Division consist of 10 reclaiming notes, 3 Exchequer appeals, 1 special case, 1 appeal, and 1 stated case under the Workmen's Compensation Act; and the 6 in the other Division are made up of 3 appeals, 1 reclaiming note, 1 stated case, and 1 remitted cause for jury trial.

Notes from London.

THE TEMPLE, *30th November*, 1922.

IN the sixth year of King Henry IV. (October, 1404) a Parliament was held, of all places in the world, at Coventry. It was derided by succeeding generations as *Parliamentum indoctum*, because no lawyer was a member thereof; this had been carefully provided for in the writs whereby the members were summoned, and so it was known as the unlearned Parliament. As was to be expected, it had a very indistinguished career. Like in our time, the need for money was very great, so the knights proposed that the revenues of the Church should be seized to provide for the wants of the day. The churchmen were, not unnaturally, up in arms against this proposal. The Archbishop of Canterbury pointed out that the knights had already for their own advantage drawn upon certain ecclesiastical benefices, whilst the Bishop of Rochester darkly hinted that those who encouraged such an audacious proposal were *ipso facto* excommunicate. The dread name of excommunication was enough to freeze throughout the Middle Ages the most daring mind, and the matter ended in the passing of still more severe measures against the Lollards. The present House of Commons will at least be free from the reproach of *indoctum* as far as lawyers are concerned, for their numbers in it amount to the respectable figure of 98, of whom 75 are barristers and

23 solicitors. Oddly enough, this number is in the aggregate the same as in the last Parliament, where there were 73 barristers and 25 solicitors. Some of these, indeed, have never practised at all, whilst others, though once eminent in the profession, have for years past given themselves exclusively to politics. The names of Mr. Asquith and Lord Robert Cecil will at once occur to the mind, nor will it be forgotten that Mr. Lloyd George is himself a solicitor.

It is impossible to discuss in detail many of these names in our Notes, though a few may be picked out almost at random. Sir Malcolm Macnaghten, K.C., and Mr. J. W. Hawke, K.C., enter Parliament for the first time. They are both prominent lawyers, the second especially being one of the most popular "silks" of the day at the common law bar. Sir John Simon, who was defeated in 1918, is once more a member of the House of Commons; not even his opponents will regret the reappearance of so brilliant a figure in what must seem its proper place. It is interesting to note that the Labour Party are represented by no less than three "silks." Mr. C. J. Mathew, K.C., is a Chancery leader, a younger son of the late Lord Justice Mathew; another, Mr. Hemmerde, has recently been mentioned in these Notes in connection with his rather unfortunate appearance as a respondent in a House of Lords appeal; the third, Mr. Patrick Hastings, K.C., enjoys a large practice in the Courts, and is the most widely known of the legal Labour members. He has had a varied career, has been mining engineer and journalist, also he served in the South African War. He has not the advantage of a University training, nor is he especially remarkable for book learning; he is skilled in cross-examination of a peculiarly subtle and refined description. Such men must have, in the excellent French phrase, the defects of their qualities; he often seems to be splitting hairs where ordinary men would say that he had already got a plain answer, with which judge and jury are sufficiently content, but if the witness be not altogether truthful, be trying, as it were, to hide something up his sleeve, then his case is altogether hopeless. Question after question of the most searching description is showered upon him until, to his discomfiture and confusion, the hidden matter is brought out to the light of day. It is to the credit of the Labour Party that they have thus furnished themselves with such skilled and trained minds to put the best construction on their policy and defend their interests.

Among barristers who are not silk and who are also new to the house, Mr. J. D. Cassels may be men-

tioned. He is a rapidly rising junior, and will probably go far in the near future. His self-reliance and audacity are his most obvious qualities; he is never put out of countenance, and has ever his reply ready on the instant. Shortly after his call to the bar he was on one occasion in a criminal trial opposed to a very eminent Old Bailey practitioner, to whom he boldly objected that he was asking a leading question. "I do not think," replied the other, "that my "learned friend quite knows what a leading question is." Mr. Cassels was the last man to be put down by a supercilious remark of this description. "I have not listened," he promptly retorted, "to my friend without knowing *that* very well." The old hand, quite taken aback, had no answer at command, so the incident closed, much to Mr. Cassels' advantage. Of all these untried men one has once more to utter the necessary caution that they are entering on a new field, and their success at the bar can only raise a presumption that they will make a figure in the House. Here, again, we must wait and see.

The presence of so many lawyers in Parliament has for centuries been objected to. The *Indoctum Parliamentum* is a useful lesson for all time that the objection may be carried too far, nay, it may reasonably be argued that it has no real merits. If to be a successful lawyer is no assurance of success in Parliament, yet lawyers have many qualities which peculiarly fit them for Parliamentary functions. In Britain changes are not brought about by revolutions, but by Acts of Parliament, and those who are trained to study such Acts must be at an advantage in the place where they are manufactured. Again, a lawyer unites two qualities which are not commonly found in the same man; he must be a student, for he has to work at his books before he can be "called" or "admitted." It is true that in England he need not be, as he must be in Scotland as well as in most civilised countries, a University man; still even in England he must go through something that is equivalent to a University training, for the days have long passed when he could become a barrister by merely eating dinners or a solicitor simply because he had been an articled clerk. Like Sir Pertinax in that once famous comedy, "The Man of the World," he requires his "modicum "of Latin," and more than a modicum in other subjects which require serious attention. Then, again, he is a business man, quite as much as if he were "something in the city." If not an orator, and mere oratory is justly looked upon with suspicion by all judicial authorities, he is accustomed to public speaking, and that not in the soliloquy of the pulpit, where there is no

one to contradict or interrupt, but in the presence of a critical and often hostile audience. He must be ready on the instant to utter his thoughts without long premeditation or the assistance of notes. All these things do not ensure success, but they are the well-nigh indispensable requisites of success. The lawyer may take a legitimate pride in the indisputable fact that all parties seek his aid, finding by experience that they cannot do without him. It is a matter of satisfaction not of regret on public, nor on professional grounds alone, that so many lawyers are in every Parliament.

Although Lord Haldane would seem to have decisively withdrawn from the field of politics, he must always remain a considerable figure in the legal world. In a recent Rhodes lecture, delivered at the University of London, he had some interesting things to say as to the evolution of our legal system. No one has a better right to talk of the work of a Lord Chancellor, and it is important to note his considered opinion that if the Lord Chancellor is to do his duty properly he must be relieved of a good deal of the work that at present is imposed upon him. Thus he is Speaker of the House of Lords, and though his duty there is merely routine and formal, yet it takes up a great deal of time which a Lord Chancellor can ill spare. He thinks that the Second Chamber, which he considers a necessary part of the English political system, will cease to be a House of Lords, and will become a Senate, where the Lord Chancellor, though no doubt he will always be by name a member, will not be a necessary or even a prominent figure. Then the judicial functions of that body will revert to the Crown, and this will lead to the institution of a single Supreme Court of Appeal for the Empire, with the Lord Chancellor at the head. This new Court will absorb the Judicial Committee of the Privy Council and the House of Lords as far as it is a Supreme Court of Appeal. Lord Haldane's words are obviously the outcome of much thought and deliberation, but there is something suspicious about this neat cut-and-dried plan. The judicial system of England has not been constructed in this way; it has not been conceived in advance, but has grown and developed. We may enter on a new era where all such things are possible, but at present it is too much in the air to be of practical importance.

The decision of the House of Lords on the third of this month in *Kerr* v. *Bryde* has created considerable commotion in Scotland, whence it came, but it seems a little strange that it should be so. In England the result seemed a foregone conclusion; in fact, the point had been already decided as far back as

February by the case of *Newell* v. *The Crayford Cottage Society*. The point decided was that the landlord could not raise the rent of a tenant under the Rent Restriction Acts without first terminating the existing tenancy. Even before the decision of the Court of Appeal in England the doctrine was accepted by English lawyers generally, and as the law of the two countries was the same on this point, it was assumed that this would also apply in the north. The only thing that seemed against this view was voiced in the remarks of Lord Justice Younger, who, however, concurred in the opinion of the other members of the Court, that a perfectly needless formula had to be gone through, since the landlord, who was really prevented by the Acts from turning out his tenant, had to make a pretence of ending the tenancy in order merely to increase the rent; still, the fact is so, nor is it difficult to find the reason. When an Act is passed which changes in a violent and arbitrary manner the existing state of the law a number of unexpected consequences happen which could not be foreseen. This is one of them. The obvious mischief is that the tenant is now in a position to recover the balance of overpaid rent, even though he agreed to such payment. It can only be said that the Acts are temporary measures, and that such an unexpected consequence is another powerful argument for their repeal in the near future.

Among recent honours bestowed on the profession not any have given more general satisfaction than the knighthoods of Mr. B. L. Cherry and Mr. Arthur Underhill. Both are profoundly versed in real property law; Mr. Cherry drafted the revolutionary Law of Property Bill, and Mr. Underhill paved the way for it. Lord Chancellors piloted the measure, but these men did the hard spadework in comparative obscurity. No honours were ever more deservedly gained.

NOTES OF ENGLISH CASES.

THE following notes are of English cases which have a bearing upon Scots law or are otherwise of general interest. They are taken from the *Times* newspaper reports, and the full report of any case may be found there under the date given in these notes. Cases repeated in the *Times* Law Reports have the reference added.

160. Municipal sewers—damage by overflow—*force majeure*—Quebec Civil Code, article 1054. The plaintiff need not prove negligence, but the defendant must show that it was a *damnum fatale*. *Quebec Railway, &c., Company* v. *Vandry*, 36 T.R. 296, vol. xxxvi., No. 112, followed. *Montreal Corporation* v. *Watt & Scott, Limited*, P.C. 3rd August. 39 T.R. 1.

161. Increase of Rent, &c. (Restrictions), Act, 1920, secs. 12 (2), 13 (1). Premises were let as a dwelling-house and bakehouse, with tools, fixtures, and fittings. In an action for recovery of possession, *held* that the premises were a dwelling-house within sec. 12 (2), and that defendant was entitled to protection. *Tompkins* v. *Richards*, 1921, 37 T.R. 299, vol. xxxvii., No. 85, distinguished. *Cohen* v. *Benjamin*, K.B.D., 16th October. 39 T.R. 10.

162. Coal Mines Control Agreement (Confirmation) Act, 1918—Coal Mines Emergency Act, 1920, sec. 9, Second Schedule, Part I. (1). The second Act repealed the first Act subject to a saving clause. *Held* that rights accrued under the first Act might be enforced. *Lambton and Hetton Collieries, Limited* v. *Attorney-General*, Ch.D. 20th October. 39 T.R. 12.

163. Reparation for accident at common law—Canadian Workmen's Compensation Acts. These Acts gave workmen a right to compensation in lieu of all rights of action. *Held* that this applied in neighbouring provinces and excluded actions at common law. *MacMillan* v. *Canadian Northern Railway Company*, P.C. 24th October, 39 T.R. 14. *Walpole* v. *Canadian Northern Railway Company*, P.C. 24th October, 39 T.R. 16. *M'Coll* v. *Canadian Pacific Railway Company*, P.C. 26th October. 39 T.R. 19.

164. Factory and Workshop Act, 1901, secs. 74-104. Regulation 19 of 1904, provided that in loading a ship in dock where there is more than one hatchway of certain dimensions, it shall be fenced or covered. *Held* that this was limited to the sphere of activity of the person carrying on the process, and that no offence under the Act had been committed. *Owner* v. *King & Sons, Limited*, K.B.D. 17th October. 39 T.R. 22.

165. Sale of goods—arbitration. A provision for arbitration as to quality if claimed within three days after the goods have been landed and not exercised within that time does not exclude an action for damages for inferior quality of the goods. *Ayscough* v. *Sheed Thomson & Co., Limited*, K.B.D. 26th October. 39 T.R. 24.

166. Gaming Act, 1922—conflicting decisions. This Act is not retrospective so as to cut off an action that had been commenced before the Act was passed. *Smithies* v. *National Association of Operative Plasterers*, 1909, 25 T.R., 209, No. 40, vol. xxv., followed. *Cole* v. *Wallis*, K.B.D. 13th October. *Bowling* v. *Camp*, K.B.D. 26th October. 39 T.R 31.

167. The contrary held. *Brookes* v. *Brown*, K.B.D. 14th October. 39 T.R. 3.

168. Extradition Act, 1870, secs. 6 and 26. Extradition granted where the accused had always been in this country, and was charged with fraudulently obtaining goods from Switzerland in concert with partners there. *The King* v. *Godfrey*, K.B.D. 18th October. 39 T.R. 5.

169. Gaming Act, 1835, sec. 2. Cheques in favour of the servant of the bookmaker *held* recoverable. *Hurst* v. *Tarsh*, C.A. 18th October. 39 T.R. 4.

170. Bankruptcy—banking. A customer of Farrow's Bank paid in a cheque for collection on 16th December, 1920. The bank suspended payment on 20th December. *Held* that the bank had not

received the money before its suspension, and had given up their functions as bankers, and that the customer was entitled to the money. *Re Farrow's Bank, Limited—Voyce* v. *The Liquidator*, C.A. 19th October.

171. Riot (Damages) Act, 1886. A riot in a military camp, resulting in damage to goods of a civilian, is within the protection of the Act. *Pitchers* v. *Surrey County Council*, K.B.D. 24th October. 39 T.R. 7.

172. Right to trade name—injunction. The defendants' name caused confusion, and was an infringement of plaintiffs' rights, but injunction was refused on the ground that the undertakings by the defendants were sufficient for plaintiffs' protection. *John Bright & Brothers, Limited* v. *John Bright (Outfitters), Limited*, C.A. 23rd October.

173. Criminal Evidence Act. A witness for the defence volunteered a statement in support of the character of the accused without being asked. *Held* that this was not a ground for attacking the character of the accused. *Rex* v. *Redd*, C.C.A. 30th October.

174. C.i.f. contract—Sale of Goods Act, 1893, sec. 33—arbitration—risk of deterioration. This risk during transit falls upon the seller. The goods must be dispatched in such a state as to arrive in a merchantable condition. Rules laid down for the guidance of arbiters. *American Trading Company* v. *Hardie, Milroy & Co., Limited*, K.B.D. 30th October.

ACT OF SEDERUNT

Under the Entail Acts.

Edinburgh, 21*st November*, 1922.

The Lords of Council and Session, in pursuance of the power vested in them by sec. 51 of the Act 11 & 12 Vict., cap. 36, and by sec. 2 of the Act 45 & 46 Vict., cap. 53, and considering that it is expedient to make further regulation as to the disentailing and acquisition in fee simple of the price of Entailed Estates sold by virtue of the Act last mentioned, and consigned in bank, or invested, in terms of sec. 23 thereof, Enact and Declare as follows, viz. :—

That in any petition for authority to acquire in fee simple the price of such Entailed Estates sold as aforesaid where such price has been consigned as aforesaid, or the investments representing said price, and made as aforesaid, or any part of said price or investments, it shall be sufficient without executing or recording any instrument of disentail to make summary application to the Court in manner provided by sec. 26 of the first-mentioned Act for warrant and authority for payment to the Petitioner of such price, or of any part thereof, or for transfer to the Petitioner of such investments, or of any part thereof, all as belonging to himself in fee simple.

And the Lords Direct this Act to be entered in the Books of Sederunt and to be printed and published in common form.

J. A. CLYDE, *I.P.D.*

Appointments, Business Changes, &c.

EDINBURGH.—Mr. David P. Fleming, K.C., has been appointed Solicitor-General for Scotland.

The Lord Advocate has appointed Mr. Alexander Maitland to be advocate-depute; Mr. John M. Hunter to be extra advocate-depute on the Glasgow Circuit, Mr. Archibald Campbell Black to be advocate-depute in the Sheriff Court; and Mr. John Prosser, W.S., to be crown agent.

The Lords in Council by Act of Sederunt have appointed Mr. Robert Candlish Henderson, LL.D., K.C., Professor of Scots Law in the University of Edinburgh, to be an examiner of law agents in place of the late Sir John Rankine.

The Lord Justice-Clerk has appointed Mr. John A. Smart to be his clerk and Keeper of the Rolls of the Second Division.

GLASGOW.—Messrs. Martin & Barrie, solicitors, 163 West George Street, have assumed Mr. James Barrie, jun., writer, as a partner.

Messrs. Lowndes & Renwick, 28 Bath Street, intimate that, owing to the state of his health, Mr. Henry F. Lowndes retired from the firm as at 31st May last. Mr. John H. Stewart, solicitor, Glasgow, has been assumed as a partner. The firm name in future will be Lowndes, Renwick, & Stewart.

FACULTY OF PROCURATORS.—The following law agents have been admitted members of Faculty:—John Stevenson Smith, 135 Buchanan Street; John Arthur Cameron, LL.B., 135 Buchanan Street; Thomas Patrick Spens, M.C., B.A.(Cantab), W.S., 169 West George Street; Harry Morris, 40 St. Vincent Place; Eric Rowley Orr, B.L., 107 West Regent Street; Colin Campbell, 170 Hope Street; Alexander Gemmill, B.L., 81 Bath Street; James Headrick, B.L., 237 West George Street; William Woodburn Gillan, LL.B., 30 George Square; Alexander Martin, 180 Hope Street; William Inverwick Thomson, B.L., 157 West George Street.

SOCIETY OF ADVOCATES IN ABERDEEN.—At the annual general meeting of the Society held on 28th November, Mr. D. M. A. Chalmers was reappointed President, Mr. William Rae was appointed treasurer, and Mr. Frederick W. Kay was reappointed secretary, factor, and librarian.

REPORTS.

LIST OF SHERIFFS, SHERIFF-CLERKS, AND PROCURATORS-FISCAL OF COUNTIES IN SCOTLAND.

JANUARY, 1922.

Counties.	Sheriffs.	Sheriffs-Substitute.	Sheriff-Clerks.	Procurators-Fiscal.
ABERDEEN,	A. L. M'Clure.	A. J. L. Laing.	David Littlejohn.	Thomas Maclennan.
		J. D. Dallas.		
ARGYLL—Dunoon,	John L. Wark.	S. M. Penney.	James Stewart.	A. R. Nimmo.
Campbeltown,	....	J. M'M. Campbell.	....	D. Mactaggart.
Fort-William,	....	Alex. Steedman.	....	Duncan Macniven.
Oban,	....	Alex. M. Hamilton.	....	D. M. Mackinnon.
AYR—Ayr,	W. Lyon Mackenzie.	J. C. C. Broun.	W. S. N. Patrick.	R. D. Macmillan.
Kilmarnock,	....	William Dunbar.	....	Wm. J. Robertson.
BANFF,	A. L. M'Clure.	John W. More.	R. G. Shirreffs.	James Kissock.
BERWICK,	John Chisholm.	R. M. Smith.	James Somerville.	S. Hilson.
BUTE,	J. M. Irvine.	Thomas J. Martin.	T. W. Alexander.	William Grant.
CAITHNESS,	J. C. Pitman.	Thomas Trotter.	Robert Bruce.	D. J. Henry.
CLACKMANNAN,	J. R. N. Macphail.	J. Dean Leslie.	J. W. Moir.	J. B. Haig.
DUMBARTON,	J. R. N. Macphail.	A. J. P. Menzies.	Daniel M'Bride.	Hugh L. Yeudall.
DUMFRIES,	George Morton.	George Campion.	John M'Burnie.	R. Y. Mackay.
EAST LOTHIAN,	G. L. Crole.	Hector Macleod.	G. H. Stevenson.	T. W. Todrick.
ELGIN or MORAY,	George Watt.	C. R. A. Howden.	J. Foster.	R. B. Gordon.
FIFE—Cupar,	J. A. Fleming.	Dudley Stuart.	Robert J. Davidson.	Geo. Brander.
Dunfermline,	....	F. A. Umpherston.	....	J. S. Soutar.
FORFAR—Forfar,	Sir John M. Lees.	Chas. T. Gordon.	....	Thomas Hart.
Dundee,	....	R. C. Malcolm.	C. J. Bisset.	W. F. Mackintosh.
INVERNESS—				
Inverness,	George Watt.	J. P. Grant.	A. A. Chisholm.	William Anderson.
Fort-William,	....	Alex. Steedman.	....	Duncan M'Niven.
Portree,	....	C. D. Valentine.	....	W. J. Robertson.
Lochmaddy,	....	....	....	A. C. F. Davidson
KINCARDINE,	A. L. M'Clure.	A. J. L. Laing.	J. M'Donald (*int.*).	M. A. Hamilton.
		J. D. Dallas.		
KINROSS,	J. A. Fleming.	F. A. Umpherston.	W. K. Falconer.	John S. Soutar.
KIRKCUDBRIGHT,	George Morton.	L. T. Napier.	John Ogilvie.	Robert Waugh.
LANARK—Glasgow,	A. O. M. Mackenzie.	J. Boyd	R. G. Slorach.	J. D. Strathern.
....	....	T. A. Fyfe.	....	....
....	....	A. S. D. Thomson.	....	....
....	....	W. D. Lyell.	....	....
....	....	B. P. Lee.	....	....
....	.. .	P. J. Blair.	. ..	....
Hamilton,	....	Hay Shennan.	....	W. Thomson.
Lanark,	....	William Harvey.	....	Thomas Tennant.
Airdrie,	....	D. S. Macdiarmid.	....	A. D. Lindsay.
LINLITHGOW,	G. L. Crole.	J. A. T. Robertson.	A. P. Simpson.	G. S. Macknight.
MIDLOTHIAN,	G. L. Crole.	R. L. Orr.	Andrew Harrison.	H. H. Brown.
....	....	Edward W. Neish.	....	G. Somerville.
....	....	Hector Macleod.	....	....
NAIRN,	George Watt.	C. R. A. Howden.	Alex. Robertson.	James Lamb.
ORKNEY,	J. C. Pitman.	A. M. Laing.	John White.	James Begg.
PEEBLES,	G. L. Crole.	Patrick Smith.	R. Lendrem-Ainslie.	J. Walter Buchan.
PERTH,	J. Condie Sandeman.	C. P. Boswell.	John Ritchie.	M. L. Howman.
RENFREW—Paisley,	J. M. Irvine.	J. A. Welsh.	A. F. Lochhead.	Donald Cameron.
Greenock,	....	J. S. Mercer.	....	William Auld.
ROSS & CROMARTY—				
Dingwall,	James Mackintosh.	Hon. H. D. Gordon.	Alex. Ross.	W. Mackenzie.
Stornoway,	....	J. R. Haldane.	....	C. G. Mackenzie.
ROXBURGH,	John Chisholm.	Ronald Baillie.	John Maclean.	S. Hilson.
SELKIRK,	John Chisholm.	Patrick Smith.	Geo. Badger.	John Pollok.
SHETLAND,	J. C. Pitman.	J. W. Forbes.	Arch. Sutherland.	J. K. Galloway.
STIRLING—Stirling,	J. R. N. Macphail.	J. Dean Leslie.	John G. Curror.	J. R. Archibald.
Falkirk,	....	J. A. T. Robertson.	....	W. K. Gair.
SUTHERLAND,	James Mackintosh.	Geo. Jas. Campbell.	J. M'Crone.	David Peters.
WIGTOWN,	George Morton.	George Watson.	John M'Millan.	Hugh Todd.
Stranraer,	....	....	....	Alex. Aitken.

SHERIFF COURT REPORTS.

SHERIFF COURT OF LANARKSHIRE.

No. 1.
LANARKSHIRE
Adams & Co. *v* North British Railway Co.

ADAMS & Co., *Pursuers;* THE NORTH BRITISH RAILWAY COMPANY, *Defenders.*

Contract—Carriage of goods—Consignee to pay freight on delivery—Damage in transit—Consignees' refusal of delivery—Consignors' title to sue carriers—Sale of Goods Act, 1893.

In this action the pursuers, printers' engineers and furnishers in Glasgow, sued for payment of £53 1s. as loss and damage sustained by them in respect of injury to a quad demy Wharfedale printing machine delivered by pursuers to defenders for conveyance to Messrs. Stafford & Co., Netherfield, Nottingham, of which the consignees refused to take delivery owing to said damage.

The condescendence set forth, *inter alia*, (1) that the pursuers on date stated delivered to the defenders at the premises of the pursuers in Glasgow a second-hand quad demy Wharfedale printing machine, of the value of £160, the property of the pursuers, for conveyance to Messrs. Stafford & Co., Netherfield, Nottingham; (2) that on arrival of said printing machine at Netherfield station, three days later, it was found to have received serious injury during transit, the side frame thereof being smashed and rendered useless, owing to the fault and negligence of the defenders in consequence of which the consignees (to whom the goods were addressed carriage forward) refused to take delivery; (3) that the delivery of the said machine to the defenders for carriage to Netherfield followed upon a sale thereof to Messrs. Stafford & Co., in terms of which the pursuers were bound to deliver the machine at the purchasers' premises at

Note.—This case was decided on 22nd June, 1912. In view of the point involved it is now reported.

Lanarkshire

Adams & Co. *v* North British Railway Co.

Netherfield, and to erect it there, the stipulated price being payable to the pursuers on erection, till when the property therein did not pass to the purchasers.

The defenders stated in answer that the goods were taken carriage forward, the carriage being payable by the consignees, and that when delivery was made to the defenders as carriers the property passed to Messrs. Stafford & Co. in terms of the Sale of Goods Act, 1893, particularly sec. 32 thereof, and they pleaded, *inter alia*, (1) no title to sue.

The Sheriff-Substitute (A. S. D. Thomson), having considered the cause, before answer allowed a proof. The note to his interlocutor was in the following terms, viz.:—

Sheriff Thomson

The question whether the pursuers have a title to sue for the alleged damage depends upon the contract of carriage made with the defenders, and this contract, in turn, seems to depend upon the contract made between the pursuers as vendors and Messrs. Stafford & Co. as purchasers. Until the terms of this latter contract are ascertained, it is impossible to affirm with certainty whether the pursuers have or have not a title to sue. The pursuers relevantly aver a contract of sale which, if proved, might, I think, in the absence of some specialty, give them a title to sue. I therefore allow a proof before answer on the whole case. (*Cf. Great Western Railway Company* v. *Bagge*, 15 Q.B.D. 625.)

A. S. D. T.

The defenders appealed to the Sheriff (Gardner Millar), who, having heard parties' procurators and considered the cause, adhered to the interlocutor of the Sheriff-Substitute and remitted the cause for further procedure, with a note to his interlocutor as under, viz.:—

June 22, 1912

Sheriff Millar

The case for the appellants was that the delivery of the printing machine to the defenders for conveyance to Messrs. Stafford & Co. operated as a delivery to the purchasers under sec. 32, sub-sec. 1, of the Sale of Goods Act, 1893, and therefore the defenders were liable to account for the machine to the purchasers, and not to the pursuers as sellers, who were no longer owners of the machine. If that had been clear from the statements on record, I think there would have been a good deal to be said for the defenders' contention, but the statement in the condescendence is by no means clear upon this point, and it was explained at the bar that the contract with the purchaser was that the pur-

LANARKSHIRE

Adams & Co. *v* North British Railway Co.

June 22, 1912

Sheriff MILLAR

suers were to send the machine to the purchasers' premises and fit it up there, and that it was not until this was done that the property in the machine passed to the purchasers. That being so, I agree with the learned Sheriff-Substitute in thinking that until the terms of the contract with the purchasers are ascertained, it is impossible to affirm with certainty whether the pursuers have or have not a title to sue. Accordingly, I think his interlocutor allowing a proof before answer should be affirmed. J. G. M.

The defenders thereafter moved for and obtained a diligence for recovery of documents, following upon execution of which and production thereunder the case was settled extrajudicially, the pursuers receiving an adjusted sum in name of damages, with expenses as taxed.

For pursuers—Mr. HAMILTON (Messrs. Archibald Hamilton & Co.), Glasgow.

For defenders—Mr. JAMES ANDREW (Messrs. Mitchells, Johnston, & Co.), Glasgow.

No. 2.

LANARKSHIRE

Black *v* M'Allister

ARCHIBALD M'GLASHAN BLACK, *Pursuer;* JAMES M'ALLISTER, *Defender.*

Landlord and tenant—Removing—Summary ejection—Waiver of notice to quit by subsequent acceptance of rent—Increase of Rent, &c. (Restrictions), Act, 1920, *secs.* 5 (1) (*b*) *and* 16 (3)—*Sheriff Courts Act,* 1907, *sec.* 37.—*Held* (1) that, subject to the saving introduced by sec. 16 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a landlord who accepts rent after a notice to quit thereby waives the notice, and is personally barred from founding on it; (2) that the giving of due notice is essential to entitle the owner to apply for a warrant of summary ejection against an occupier who holds *qua* tenant, and that breach of the obligations of the tenancy on the part of the tenant does not obviate the necessity of such notice.

The following interlocutor and note of the Sheriff-Substitute (HARVEY), against which no appeal was taken, sufficiently set forth the facts bearing on the question at issue:—

Jan. 14, 1921

Sheriff HARVEY

LANARK, 14*th January,* 1921.—The Sheriff-Substitute, having heard the agents for the parties on the closed record, finds that it is admitted (1) that the defender occupies the dwelling-house in question as a yearly tenant under a lease granted by a former owner of the subjects; (2) that the pursuer acquired the subjects, including said dwelling-house, by disposition dated 23rd, and recorded 30th April, 1920, his term of entry being declared to be Whitsunday, 1919; (3) that notice of termination of tenancy of said dwelling-house

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Black v M'Allister
Jan. 14, 1921
Sheriff Harvey

at Whitsunday, 1920, was given by the pursuer to the defender on 26th March, 1920; (4) that subsequently to said notice the pursuer received and accepted the stipulated rent due for said dwelling-house at Whitsunday, 1920, and at Martinmas following; (5) that notice of termination of tenancy of said dwelling-house at said term of Martinmas (28th November, 1920) was given on behalf of the pursuer to the defender on 15th November, 1920: Finds in law (1) that by said acceptance of rent at Whitsunday and Martinmas, 1920, the pursuer waived said notice of 26th March, 1920, and is personally barred from founding on it; (2) that said notice of 15th November, 1920, was not timeous or sufficient; and (3) that the giving of due notice is essential to entitle the pursuer to apply for the warrant of summary ejection craved; therefore sustains the defender's second plea in law, and dismisses the action as incompetent; finds the defender entitled to expenses, fixes same on the lower scale, allows an account thereof to be lodged in process, and when lodged remits the same to the Auditor of Court to tax and to report. W. Harvey.

Note.—The defender states (answer 7) that "notwithstanding the notice of warning away on 26th March, 1920, the pursuer accepted the rent due at Whitsunday, 1920, and Martinmas, 1920." The pursuer does not deny this statement, and it must therefore be taken as admitted. In England it has been held that by such acceptance of rent a previous notice to quit is waived, and the giver of it precluded from founding on it (*Hartell* v *Blackler*, 1920, 2 K.B. 161), and this is the rule unless the period covered by the rent so accepted is less than three months (Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, sec. 16 (3)). In Scotland also it is recognised that receipt of rent amounts to homologation of the lease as existing (Rankine on Leases, 2nd edition, p. 94).

The notice given on 15th November to the defender to remove on the 28th November was, of course, not sufficient. There was therefore no notice to quit given in this case on which the pursuer is entitled to found; but he maintains that the necessity of notice was dispensed with by the defender's conduct as set out in the pursuer's condescendence, and by his breach of implied conditions of his tenancy, these including, according to the pursuer, that the defender and his family "shall occupy the house in an orderly and reasonable manner, and shall not damage the property nor cause annoyance to the neighbouring occupiers."

No authority was cited to me affirming that these obligations are implied in the lease of a dwelling-house by the common law of Scotland. Landlord and tenant, so far as

regards their relations with third parties, seem to be treated as independent of each other, and the tenant as free, so far as the landlord is concerned, to respect or infringe the rights of others (Rankine, Leases, 2nd edition, 568). A tenant is under obligation to his landlord " to use reasonable diligence to preserve the house from harm ' (Erskine II. 6, 43; *Mickel* v *M'Coàrd*, 1913, S.C. 896), but undertakes in my view no obligation to his landlord not to cause annoyance to neighbours. The neighbours are left to find their own remedy.

It may, however, be admissible to regard such obligations as statutory obligations of the tenancy under sec. 5 (1) (*b*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. However this may be, it does not seem to me that a breach of the obligations of the tenancy dispenses with the necessity of notice as a preliminary to proceedings for the removal of a tenant. Notice appears to be requisite in every case of an ordinary removing, as distinguished from extraordinary removings founded on legal or conventional irritancies (Rankine, Leases, 2nd edition, p. 495).

By sec. 37 of the Sheriff Courts Act, 1907—under which this case falls—due notice is made equivalent to the action of removing, and it is that notice which entitles the owner to apply to the Sheriff for the warrant for summary ejection (*Campbell* v *O'Neill*, 1911, S.C. 188, 197). The defender is not a mere squatter, and as such liable to summary ejection without notice; nor does it put him in the position of a squatter that he may be in breach of an obligation of the tenancy, although that might constitute an irritancy and justify proceedings for an extraordinary removing at any period, whether the natural ish of the lease or not, without the necessity of warning.

If warning was necessary, and the pursuer is personally barred from founding on the only timeous warning given—that of 26th March, 1920—the action must be dismissed as incompetent.

The fact that the pursuer was not infeft when he gave the warning of 26th March, 1920—a defect in title which was the main theme of the defender's argument—seems to me immaterial, since the defect was cured by the recording of the disposition on 30th April, 1920, before this action was called in Court (*Campbell* v *M'Kellar*, 1808, M. Appx. " Removing," 5). W. H.

For pursuer—Mr. J. M. DAVIDSON (Messrs. Davidson & Shirley), Lanark.

For defender—Mr. J. C. ALLAN (Messrs. Hay, Cassels, & Frame), Hamilton.

SHERIFF COURT OF RENFREW & BUTE.

No. 3.
Renfrew and Bute
Millar *v* Bonar

Robert Millar, *Pursuer;* Mrs. Mary Bonar, *Defender.*

Negligence—Property—Private avenue—Accessible for business purposes—Horse yoked to lorry delivering goods eating leaves of yew tree and being poisoned—Implied invitation—Duty to fence.—Held that the proprietor of the *solum* of a private avenue, which was the sole access to certain dwelling-houses built on feus given off by said proprietor, was liable for damages in respect of the death of a horse which was poisoned by eating the leaves of a yew tree planted in the avenue, for the reason that there had been neglect of the duty to fence a dangerous thing situated in a place to which persons having business with the occupants of said dwelling-houses were impliedly invited.

The subjoined interlocutors of the Sheriff-Substitute (Welsh) and the Sheriff-Principal (Irvine) sufficiently state the facts of this case—

May 19, 1921
Sheriff Welsh

Paisley, 19*th May*, 1921.—The Sheriff-Substitute, having considered the proof, productions, and whole cause, finds in fact—(1) That an avenue 103 feet in length and 14 feet in width, running northwards from Bonar Crescent, Bridge of Weir, forms the only access to the house and grounds known as Hilltop, the entrance gate to which is situated at the north end of said avenue; (2) that said avenue also gives access to the house and grounds known as Evandale, situated on the east side thereof, and to the house and grounds known as Edgemount, situated on the west side thereof; (3) that the defender is owner of the *solum* of said avenue, which has not been feued, and that she is superior of the ground upon which the three houses Hilltop, Evandale, and Edgemount are built; (4) that it is provided in the feu contracts of said three subjects that the feuars shall have "free ish and entry" from said avenue, and shall have right to the use of said avenue, and shall be bound "jointly to maintain it rateably according to their feu-duties, and they shall be bound not to allow any coal, ashes, dung or any description of rubbish to lie on said Hilltop Avenue, but shall be bound to keep it in a neat and proper manner, and each feuar shall have the right to insist on the other feuars implementing this obligation," but that the possession and control of said avenue remains with the defender; (5) that two trees (one of which, viz., that on the left side of the avenue facing towards the entrance gate to Hilltop, is a yew tree) have been planted in the *solum* of

the avenue near the entrance gate to Hilltop, and that said yew tree which belongs to the defender is poisonous to animals; (6) that on 13th March, 1920, about 9.15 a.m., Archibald Brodie, an employee of the pursuer's, was in charge of a horse and lorry belonging to the pursuer, and was delivering certain goods from Bridge of Weir railway station to Mr. William Murphy at said house Hilltop, and had drawn up his horse and lorry at the entrance gate to Hilltop; (7) that while the said Archibald Brodie was lifting two boxes off said lorry and depositing them on said avenue at the entrance gate of Hilltop the said horse ate some of the twigs and leaves of said yew tree; (8) that as the result thereof the said horse died within an hour thereafter; (9) that said yew tree was not fenced in any way, and that no steps were taken by the defender to make said yew tree inaccessible to animals; (10) that said avenue has for many years been used for cart traffic going to and from said three houses, and that the defender has not prevented the avenue being used as an access for that purpose; (11) that the said Archibald Brodie did not know that said tree was a yew, and poisonous to animals, and that he neglected no reasonable precaution which he ought to have taken for the protection of the horse in the usual course of delivering goods at Hilltop: Finds in law in these circumstances, that the defender invited persons having business with the occupiers of Hilltop to use the avenue in question as the access to Hilltop; that the defender was bound to fence said yew tree as a protection for animals brought on to her property by persons having such business; that the death of said horse was caused through fault or negligence on the part of the defender in failing to fence said tree, and that she is liable in damages to the pursuer; assesses said damages at the sum of forty-five pounds sterling; therefore repels the defences, and grants decree in favour of the pursuer against the defender for the sum of forty-five pounds sterling, with interest thereon at the rate of 5 per centum per annum from the date hereof until payment; finds the defender liable to the pursuer in expenses; allows an account thereof to be given in; and remits the same, when lodged, to the Auditor of Court to tax and report. J. A. WELSH.

Note.—On 13th March, 1920, at about 9.15 a.m., the pursuer's employee, Archibald Brodie, was in charge of the pursuer's horse and lorry, and was delivering certain goods at the house of Mr. Murphy, known as Hilltop, Bridge of Weir. Within an hour thereafter the horse dropped down dead in a street in Bridge of Weir. The first question is—What was the cause of death? The answer, on the evidence,

in my opinion, is that the cause of death was poisoning from eating the twigs and leaves of a yew tree planted in the *solum* of the avenue leading up to and situated near the entrance gate to Hilltop on the left hand side looking up the avenue towards the house. The circumstances in which the pursuer's horse ate of the yew tree are disclosed in the evidence as follows:—On the date in question the pursuer's employee, Archibald Brodie, proceeded, in charge of the pursuer's horse and lorry, from Bridge of Weir railway station to deliver certain goods at Hilltop. He went up the avenue, which is the only access to Hilltop, and on arrival at the entrance gate he halted his horse three or four yards from the gate. He then went in and told Mrs. Murphy, who was standing at the door, that he had brought some goods from the station, and she told him to lay them against the "dyke" in the avenue. He did this, and then returned to the station, where he loaded a ton of flour for a local baker, and while delivering this load, his horse dropped down dead. Now, the evidence of Mrs. Murphy, who was standing at the door all the time, is to the effect that she saw the horse edging up towards the yew tree, and drawing the branches down. In answer to the question—"When you saw the horse draw the tree down, did you see it eating the branches of the tree?"—the witness replies—"Yes, I think so, it was chewing away." It was contended for the defender that this witness had so far qualified her evidence by the phrase "I think so," that it was much too vague to be accepted. I do not agree. I think the evidence of this witness, when fairly read, leads to the conclusion that the horse drew down the branches of the tree and chewed at them. The phrase "I think so" does not, in my view, express doubt, but signifies that the witness from what she saw concluded that the horse ate of the yew tree. The driver of the lorry—Brodie—was at the time on the top of the lorry unloading the boxes from the back of the lorry, and he frankly states that he did not see his horse eat the twigs or leaves of the tree. He, however, corroborates Mrs. Murphy to this extent, that while he halted his horse some three or four yards from the tree it moved forward "one and a half yards anyway," and at this distance from the tree the horse "could stretch its neck, and catch the tree quite easily, it only needed to shove its neck out." The evidence of Mrs. Murphy however receives, to my mind, sufficient corroboration from the testimony of Mr. Pottie, the veterinary surgeon, who made a *post-mortem* examination of the horse two days after its death. It may be noted that Mr. Pottie states that the symptoms of yew tree

poisoning are very sudden in development, and that the animal quickly becomes prostrate and dies in an hour or two. That is exactly what happened to the pursuer's horse shortly after it had left Hilltop. Now, on examination, Mr. Pottie found yew twigs and leaves in the stomach of the horse, and he states his conclusion thus—" I am absolutely certain in my own mind from my examination that this horse died of yew poisoning." Mr. Pottie was pressed in cross-examination as to the reason why he did not obtain an analysis of the contents of the stomach; as to whether he might not have been mistaken regarding the kind of leaves which he found in the stomach; as to whether the amount which he found would be a fatal dose; and as to whether there might have been beans among the horse's food containing prussic acid, which might have caused the death. Mr. Pottie's answer to all these suggestions is the very definite and clear one that his examination revealed that the cause of death was yew tree poisoning, and that alone. The pursuer also on the day of Mr. Pottie's examination saw green leaves in the horse's stomach. It was suggested on behalf of the defender that it had not been proved that the horse which ate the yew tree was the horse which was afterwards examined by Mr. Pottie. Now, when the pursuer's horse dropped, a telephone message was sent to Forrest's, Chain Road, Paisley, to come and lift the animal. The pursuer saw this done, and he instructed his son to telephone for the veterinary surgeon to examine the horse at Chain Road. The veterinary surgeon did this two days afterwards, and the pursuer on the same day as the examination saw the horse's stomach. The pursuer refers in his examination to the horse which he saw at Chain Road as being the horse which he bought six weeks before, and, in my opinion, there is no doubt that the horse which died is the horse which was examined. It is, in my judgment, proved that the pursuer's horse ate twigs and leaves off the yew tree in the avenue leading to Hilltop, and died thereafter from yew tree poisoning.

The second question is—Whether in these circumstances the defender is liable in reparation to the pursuer? The evidence of the witness William Brock is to the effect that the two trees were planted by a Mr. Clark, who was the owner of Hilltop fifteen years ago. Now, it has been held, on appeal, by the learned Sheriff-Principal on a consideration of the general feuing conditions and of the feu contracts relative to the subjects known as Hilltop, Evandale, and Edgemount respectively, that the possession and control of the avenue, which is unfeued, remains solely with

the defender, and that the three feuars have conferred upon them merely the right of "free ish and entry," and the right to use the avenue, and are obliged to maintain it, *i.e.*, to keep it in repair. It has also been held on a consideration of the above-mentioned documents that the trees planted in the *solum* of the avenue are the property of the defender, and that the feuars were neither bound nor entitled to remove the trees without the consent of the defender, who is responsible for "any condition of unsafety arising from the trees." The question then comes to be whether the defender expressly or impliedly invited persons going to Hilltop to use the avenue? Now, the feu contract as has already been mentioned, gives the feuars right of "free ish and entry" from the avenue, and right "to the use thereof," and that, in my opinion, gives not only a right to the feuars, but also implies an invitation to those having business with the feuars to use the avenue as a means of access. The evidence discloses that the avenue is the sole access to Hilltop, and the conclusion, in my view, is that the defender must be held to have intended that the avenue should be used, without distinction between foot passengers and horse traffic, as the access for those having business at Hilltop. The defender, in support of her averment that the avenue was not intended for horse traffic, refers to the fact that the kerb at the Bonar Crescent end of the avenue is unbroken (see plan No. 6 of process, which is admittedly incorrect, because the dotted line which is shown as broken ought to be continuous). Now, this fact does not, in my view, indicate that the avenue was not intended to be used for horse traffic, because the Bonar Crescent end of the avenue is left open, and there is no indication that it was intended to close it against horse traffic by posts having been placed in the ground at the end of the avenue, or by a notice to that effect being posted up. As matter of fact, as appears from the evidence, the avenue has been used as the access for horse traffic to the three houses for a long number of years. The pursuer states—"Carts go up regularly to the houses, and even taxis go up . . . We delivered coals at Hilltop House. We delivered them also to Brock and Gibson. We have delivered other goods at Hilltop. When we delivered coals at Brock's house, they were put in the lane. We drove up the lane to the small gate in the lane, and then tipped the coals on to the lane . . . In going to Gibson's house on the other side of the lane I adopted the same principle. That has gone on for a period of eighteen years." Mrs. Murphy says—"I do not understand that we are restricted from having cart traffic coming up to our

house. I never heard of that restriction. As a matter of fact, carts of all descriptions have come up this road to our houses. In these carts we get coal, manure, oil, and other goods." Brodie, the driver of the cart on the occasion in question, states—" It was not always at Murphy's that I was calling; that was the first time I was there. I had been at Mrs. Brock's and Mrs. Gibson's before this. I always took their coal up the road, and put it at the gate in the same avenue." It is thus clear that for many years the avenue has been used not only by the occupiers of the three houses, but also by persons visiting the houses on business in the manner in which, in my opinion, the defender intended that it should be used. On this part of the case I am of opinion that the defender must be held to have impliedly invited persons who had business at Hilltop to come upon her property in order to obtain access to Hilltop. Now, the yew tree is poisonous to animals, and is a dangerous thing situated upon the defender's property. It was therefore her duty to fence it so as to make it inaccessible to animals who were brought on to the defender's property by persons visiting Hilltop on business. She failed to do so, and she was thus negligent. The defender contends that she should escape liability on the ground that the trees in question were planted by some person or persons unknown to her, and without her knowledge or consent. The answer to this contention, in my view, is that a reasonable inspection would have revealed the true state of matters, and that the defender ought to have known that a dangerous thing was situated upon her property.

The defender pleads contributory negligence on the pursuer's part. In support of this plea it was contended that the driver of the lorry ought to have seen the tree and turned his horse's head away from it. Now, this argument presupposes knowledge of the poisonous nature of the tree on the part of the driver. There is, however, no foundation in fact for this suggestion. The occasion in question was the first upon which the driver had visited Hilltop. He did not know that one of the trees was a yew. He says, " I saw two trees, one on each side of the gate, when I was there. I do not know what sort of trees they were. I did not know anything about them." There is, moreover, no foundation, in my view, for the suggestion that the driver was guilty of contributory negligence in leaving his horse momentarily unattended in order to unload the goods at Hilltop gate. He halted his horse some 3 or 4 yards from the yew tree, and, as he puts it, " I was never off; I was on the lorry all the time. I slipped the stuff over the back door and jumped off the lorry, and just canted it over against

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the dyke." While the driver was thus engaged he could feel the horse " pooking," so that the drawers got tightened, and then " it shoved back," but I do not think this light movement of the horse laid any duty upon the driver to go to the horse's head and prevent the " pooking " or ascertain the reason for it. It is common knowledge that a slight movement of this kind is an ordinary incident when a horse is standing.

On the question of damages, I think the amount sued for is moderate. The horse cost £45 six weeks before it died, and the pursuer got 25s. for the carcase. He bought a horse to replace the one which died, at a price of £54, but this animal died shortly afterwards, and he had to purchase a third horse, at the price of £53.

On the whole matter, I am of opinion that the defender is liable in reparation to the pursuer, and that he is entitled to decree for the sum of £45, with expenses.

J. A. W.

August 15, 1921

Sheriff Irvine

Paisley, 15*th August*, 1921.—The Sheriff, having considered the cause, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute of 19th May, 1921, appealed against; finds the defender liable to the pursuer in his expenses of the appeal; on the motion of the defender, grants leave to appeal; and remits the case to the Sheriff-Substitute. J. M. Irvine.

Note.—The defender contends that it is not proved that the death of the pursuer's horse was caused by its having eaten of the yew tree in Hilltop Avenue. The evidence on this question is examined in detail by the Sheriff-Substitute in the note to his interlocutor, and it is unnecessary to resume it. I agree with the Sheriff-Substitute that the evidence—in particular, the evidence of Mrs. Murphy, who saw the horse nibbling the yew tree, and of Mr. Pottie, the veterinary surgeon, who made a *post-mortem* examination of the horse—establishes that the pursuer's horse ate of the defender's yew tree, and died in consequence of having eaten of that yew tree.

The yew tree—it appears from the evidence that, contrary to the statements on record, there were not two yew trees at the north end of Hilltop Avenue, but only one—was growing on the actual *solum* of the avenue, close to the entrance gate to Hilltop. The entrance gate to Hilltop, at the end of the avenue, affords entry only for pedestrians, and not for carriages (see the evidence of Woodrow), so that horse-drawn vehicles delivering goods to Hilltop have to come to a halt outside that gate for a longer or shorter period.

The yew tree was not planted by the defender, and it is

not proved that it was put there with her knowledge or authority. But it had been there for many years, and the case must be taken on the footing that the defender knew, or ought to have known, that it was there. An occupier may be liable for a danger existing on his premises whether he created that danger or not.

The defender is owner of the *solum* of the avenue, which has not been feued, and of the yew tree planted in that *solum*. Moreover, it is, in my opinion, plain, for the reasons stated in the note to my interlocutor of 19th January, 1921, that the possession and control of the avenue and of the yew tree remain with the defender, and with the defender alone.

The avenue is the only access to Hilltop. The defender must have contemplated that it would be used by persons having business with the occupiers of Hilltop, and such persons must be considered as invited by the defender to use that access. The defender maintains that it was not contemplated or intended that the avenue should be used for horse traffic. In support of that contention she lays stress on the fact that the kerb and gutter along Bonar Crescent are continued, straight and uninterrupted, opposite the entrance to the avenue. (It is admitted that the plan (No. 6 of process) is in error—a regrettable error—in respect that it shows over against the entrance to Hilltop Avenue a break in the dotted line, which represents the kerb along Bonar Crescent, and on each side of that break a curve in the dotted line trending towards Hilltop Avenue.) The fact that the kerb along Bonar Crescent is continued unbroken opposite the entrance to the avenue is an element deserving consideration; but it cannot, I think, be taken as in itself an indication or notification that the avenue was not to be used by horse-drawn vehicles. The evidence of Mrs. Murphy, the wife of the proprietor and occupier of Hilltop, is that the avenue—she speaks of it as "the lane," and the name "Hilltop Avenue" was apparently unknown to her—is the only entrance to that house, and that she never heard of any restriction on the use of the lane by cart traffic. "As a matter of fact," she says, "carts of all descriptions have come up this road to our house. In these carts we get coal, manure, oil, and other goods. When the carters come they drive up this avenue; they come right to our gate." John Millar, who has been a carter in Bridge of Weir, in the employment of his father, the pursuer, for nine years, states, "I am usually engaged delivering parcels and goods from the railway station. I have been up Hilltop Avenue delivering goods, coals, and sundries of all descriptions." The pursuer, who has carried on business as a carting contractor in Bridge of Weir for eighteen or twenty years, says—"I have always

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gone up that road with carts and lorries since ever I came to the place . . . Carts go up regularly to the houses, and even taxis go up." He describes the manner in which, to his knowledge, for the last eighteen years coals and other goods have been delivered from carts to the several houses having an entrance from this lane. This body of evidence that the lane has been in ordinary use for horse traffic during many years is not impeached or contradicted in any way. The reasonable inference—and, as it seems to me, the only reasonable inference—is that the defender knew that the lane or avenue was in regular use by horse-drawn vehicles; that she permitted and sanctioned such use; and that by her conduct or acquiescence she impliedly invited persons who had occasion to deliver goods at Hilltop from horse-drawn vehicles to bring their horses and vehicles along the lane or avenue up to the entrance gate at Hilltop. The implied sanction and invitation thus given by the defender may, I think, fairly be regarded as a matter of business on her part, and not a mere matter of grace or favour; for she, as superior of Hilltop and the other houses entering from the avenue, had an interest that the means of access to these houses should be as ample and convenient as the circumstances permitted.

In this state of facts there was, as I read the authorities both in Scotland and England, a duty in law on the part of the defender towards persons using the avenue in ordinary course of business for the delivery of goods at Hilltop from horse-drawn vehicles, to keep the road in a condition reasonably safe for horses, and to prevent the horses of persons so using the road from being exposed to unusual danger.

A yew tree is, as is strikingly demonstrated by the evidence in this case, a thing of a noxious and dangerous kind to horses. The danger arising to horses from this yew tree, placed, as it was, on the *solum* of the avenue, near the entrance gate to Hilltop, where horse-drawn vehicles had necessarily to halt, was one which a reasonably prudent person in the position of the defender could, and would, have ascertained, and anticipated and guarded against. No precautions were taken by the defender to guard against this danger. In the whole circumstances, I am unable to avoid the conclusion that the defender was in breach of the duty incumbent in law upon her towards persons lawfully using the avenue for horse traffic on her implied invitation to keep the avenue in reasonably safe condition.

There remains the question whether there was contributory negligence on the part of the pursuer's servant, Archibald Brodie, who was in charge of the horse and lorry. The evidence of Brodie is that he saw two trees, one on each side

of the entrance gate to Hilltop, but that he did not know what sort of trees they were. The Sheriff-Substitute, who had the advantage of seeing and hearing the witnesses, has found in fact that Brodie did not know that one of these two trees was a yew, and poisonous to animals. That finding in fact, which, on my reading of the evidence, is entirely justified, is vitally important in considering the question whether there was contributory negligence on the part of Brodie. It is well settled that conduct or acts which might be contributory negligence on the part of a visitor who knows of a danger may be reasonable and proper on the part of a visitor who is ignorant of the danger. Brodie, in the witness-box, described in detail his actings in course of delivering the boxes from the lorry at the entrance gate to Hilltop. Having regard to the fact that he had no knowledge or notice of the danger, his actings did not, in my opinion, show any want of ordinary care. He acted in the usual course of carters delivering such goods under such circumstances, and I do not think that his actings can reasonably be regarded as negligent or improper. In my judgment, the whole effective cause of the injury to the horse was the yew tree planted in the *solum* of the avenue and allowed by the defender to remain there unguarded.

The defender asked that, in the event of my affirming the interlocutor of the Sheriff-Substitute, I should grant leave to appeal. The case raises questions which, it seems to me, are not inappropriate for consideration by a higher Court. I have therefore granted leave to appeal. J. M. I.

No appeal was taken.

For pursuer—Mr. MAIR (Messrs. John B. Stirling & Mair), Johnstone.

For defender—Mr. GIBSON, advocate, instructed by Messrs. M'Innes, Mackenzie, & Lochhead, Paisley.

SHERIFF COURT OF MIDLOTHIAN.

JAMES OLIVER ELLIOTT, *Pursuer;* NORTH BRITISH RAILWAY COMPANY, *Defenders.*

Reparation—Negligence—Property—Deposit of rubbish in adjoining field.—A railway company whose servants deposited miscellaneous rubbish in a field without the permission of the proprietor or tenant thereof *held* liable for the loss of a cow belonging to a shepherd in the employment of the tenant, which while grazing in the field ate some rags with paint on them which she found among the rubbish, and in consequence died of lead poisoning.

Evidence—Circumstantial—Claim for reparation—Burden of proof.—*Held* that the pursuer had proved his case, the inferences from the facts and

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circumstances pointing to the loss being due to fault of defenders, and their explanations and theories as to the occurrence not supplying any reasonable account of how the loss could have been otherwise caused.

Process—Expenses—Fees to counsel—Circumstances in which fees allowed to counsel for the pursuer, though defenders were not represented by counsel.

The circumstances out of which the claim for reparation forming the subject of this action arose are sufficiently detailed in the subjoined interlocutors by the Sheriff-Substitute (R. L. Orr, K.C.), and the Sheriff (Crole, K.C.)—

April 29, 1921

Sheriff Orr

Edinburgh, 29*th April*, 1921.—The Sheriff-Substitute, having heard counsel for the pursuer and the agent for the defenders and considered the cause, finds in fact (1) that pursuer was in 1919 a shepherd on Tynehead Farm, Midlothian, and was owner of a cow which regularly grazed on a field in said farm adjoining defenders' line of railway near their station at Tynehead; (2) that said cow took ill on 9th June, 1919, and died on the evening of 10th June; (3) that the cause of death was acute lead poisoning contracted by eating rags with paint on them; (4) that said rags were eaten not more than forty-eight hours before the cow died; (5) that on or about 30th May, 1919, servants of defenders deposited a quantity of rubbish containing poisonous rags with paint on them in a belt of trees forming a part of said field where pursuer's said cow and the cows of the tenant of said farm were permitted and were in use to graze, within the knowledge of defenders' said servants; (6) that defenders had no permission from either the tenant or proprietor of said Tynehead Farm to deposit said rubbish in the said field; (7) that pursuer's said cow ate some of said rags so deposited by defenders' servants, and died in consequence thereof: Finds in law that pursuer's said cow was poisoned through the negligence of defenders or of their said servants for whom they are responsible; finds that defenders are liable in reparation therefor to pursuer; therefore sustains pursuer's first plea in law and repels defenders' pleas in law; assesses the damages due to pursuer at £52, and grants decree against the defenders for payment thereof to the pursuer; finds the defenders liable to the pursuer in expenses, and remits the account thereof when lodged to the Auditor of Court to tax, allowing fees to counsel, and to report.

R. L. Orr.

Note.—The pursuer here was a shepherd on Tynehead Farm in 1919. A cow belonging to him which was in use to

graze on a field there adjoining defenders' Tynehead station died in June, 1919; he alleges it was poisoned by eating some refuse deposited in the field by defenders' servants, and he now sues for the value of the cow, which he estimates at £52.

The cause of the cow's death is clearly proved, but the question of liability for it on the part of defenders rests on circumstantial evidence, and is therefore not free from difficulty. In my opinion the circumstances point so strongly in one direction that it is a fair and reasonable inference that the cow chewed some poisoned rags which were deposited on the farm by servants of defenders. It follows that defenders are liable for the consequences of their servants' wrongful act.

First as to the facts which are proved beyond doubt. As appears from the plan No. 14 the North British Railway intersects Tynehead Farm. The farm buildings are to the east of the line of railway, the field marked A lies on the west. In this field pursuer's cow grazed daily along with cows belonging to the farm tenant, Mr. M'Morran. A belt of trees skirting the railway formed part of field A. It was not separated from the open part of the field in any way, and the cattle in the field regularly wandered through it. The grass was good among the trees, and the cattle seem to have liked going there. M'Morran became tenant in 1917, and pursuer a shepherd with him about the same time. Some two years ago pursuer bought the cow in question from the farmer. Since 1917 M'Morran's cows grazed regularly in the field A, and since pursuer bought his cow it has grazed with them. It was a good and perfectly healthy cow, but on 9th June, 1919 it took suddenly ill. A veterinary surgeon found it suffering from acute lead poisoning, and it died on the evening of the 10th. There is no doubt whatever as to the cause of death. It was acute lead poisoning, and the animal must have taken the lead into its stomach from twenty-four to forty-eight hours before its death—that is, on 8th or 9th June. On analysis of the stomach lead was found to be present in considerable quantities. It is another important fact in the case that one of M'Morran's cows which grazed in the same field took ill on the 13th, showing exactly the same symptoms, and it died on the 15th from the same disease, after two days' illness. It was also proved that lead—white lead or red lead—is found in paint: white lead is the basis of most paints.

How, then, did the cows come to take lead into their stomachs? In the case of the first cow a post-mortem examination was made, and a piece of sacking or rag was

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found in the first stomach. The stomach was gangrenous where it had been in contact with the rag. If the cow had been poisoned by rags, it does not necessarily follow that many pieces of rags would be found in the stomach. The rags would be partly digested; minute pieces of rags might be found. On 10th June, after pursuer's cow took ill, a search of the field where the cows grazed was made by pursuer M'Morran and a young man Kennedy, an agricultural student, then living with the tenant. They found nothing in the lower part of the wood or in the open field. But they found a rubbish heap among the trees at the place marked B on the plan (No. 14)—about 15 yards from the gate leading into the trees from the road immediately across the railway bridge. The rubbish heap was about eight or ten yards from the fence dividing the railway ground from the belt of trees. On examining the surface of the heap they found, in the words of M'Morran, who appeared to me to be a careful man and a trustworthy witness, "rubbish of nearly every description. There were some ashes and some soil, rubber, iron, rags, tin cans, glass, and a few various other articles. There was also some zinc or lead." Pursuer and M'Morran went at once to the stationmaster Crawford to complain and tell him what they had found. They took some things from the heap with them to show to him. Crawford corroborates their evidence to this effect, and admits that, among other things, they had one or two rags with them. Crawford went back with them and saw that the heap had been flattened down, and that there were some rags near the edges of the heap two or three yards away. After the 10th M'Morran's own cows still remained in the field till the 13th, when the second cow took ill, and they were then all removed. The reason why pursuer and M'Morran went at once to the stationmaster on the 10th was that they had seen some surfacemen, railway servants, a few days previously—on or about 30th May—carrying up from the station several barrow-loads of rubbish and depositing them at the place where they found the heap in the wood. After the discovery on the 10th, M'Morran asked the stationmaster to remove the rubbish that had recently been put there, and part of it was removed by the railway servants on the following day, the 11th. But when his own cow took ill, and died a few days later, M'Morran made a further search among the rubbish on the 13th along with Kennedy. They found some rags among the rubbish with quantities of paint on them. The colour was mostly white, but they could make out red on some of them. The rags showed indications of having been chewed by cattle. Some of these rags were collected and

sent to Professor Gemmell of the Royal Dick Veterinary College for analysis. Professor Gemmell found that they contained lead—2·7 of the quantity he took for analysis. Thereupon a claim was intimated to the defenders. Some days later, upon 21st June, railway servants removed a further quantity of rubbish from the wood. Crawford, the stationmaster, admits that on the 11th more than half of the rubbish was removed, and that there was a subsequent removal, though he cannot speak to the date. The rubbish so removed was dumped on the embankment, the railway company's property. On 17th July M'Morran got permission from Crawford to examine the rubbish which had been dumped on the embankment. He and Kennedy riddled a quantity of it. They found rags among this rubbish, some of them bearing stains which looked like paint. In Crawford's presence they tied them together and labelled them. These rags also were sent to Professor Gemmell, and on analysis he found lead in the rags—7·1 per cent. of lead of the quantity he took. On 30th June Mr. Boath, an engineer in defenders' service, went out to make inquiries. He says he found "some pieces of coal and some ashes and bits of stick lying round about within 10 or 15 feet of where our men were said to have put stuff down" in the plantation. M'Lean, the foreman surfaceman, was present, and, according to him the stuff lying about then consisted of "ashes and pieces of wood and pieces of coal—house ashes." Boath told him to clean all this away. M'Lean demurred, saying he had not put that stuff down, but he did in fact remove it on Mr. Boath's order. The cows were then put back into the field, and nothing further happened to them. Defenders' position is that they admit depositing on or about 30th May quantities of rubbish, mainly engine ashes, but they deny that there were any rags among them. They deny that their servants used such rags for their work. Undoubtedly defenders had painters working at and about the station in 1917 and 1918, and plumbers in 1918 and 1919, but all these men deny using rags similar to those which were found on the rubbish heap among the trees and in the rubbish on the embankment.

It is not unimportant to note how the practice began of putting things in the wood. Cole, a porter at Tynehead station, explains it. He attended to the flower borders at the station, and during the last twenty years has been in the habit of getting soil for these borders from the plantation. He also deposited during all that time the cleanings from the borders, weeds, and bits of flowers and some earth among them, putting them into the holes from which he had taken the soil. That, of course, would do no harm to cattle

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grazing in the field. Cole's account agrees with M'Morran, who states that there was some rubbish put in his field six weeks or thereby after he entered the farm in 1917. It just lay there doing no harm, and he made no objection. But it is clear the railway servants did this at their own hand. They neither asked nor received permission from M'Morran, and the factor proves they received no permission from the landlord. Whatever was done was done surreptitiously so far as either landlord or tenant was concerned. But Cole adds that the stuff which he saw four surfacemen putting down in the plantation in the beginning of June, 1919, was quite different from the stuff which he was in the habit of putting down. He does not know what it was composed of, but he supposes there would be a lot of ashes in it. It appears, too, that the surfacemen gathered their rubbish from various quarters. Cole took his refuse "from the flower beds and nothing else." But the stationmaster gives a quite different account of the surfacemen's operations. The rubbish they collected "was taken from the neighbourhood of the waiting rooms and the platform. The waiting rooms are built up against the embankment, which has been hollowed out and built up to receive them, and there is a space of about a foot or 18 inches or so between the retaining wall and the waiting rooms, and various odds and ends gather in there, consisting largely of smoke-box ashes emitted by the engines on the hill. . . . The refuse that was ultimately put in the field consisted mostly of the stuff that was taken from the back of the waiting rooms. . . . So far as I remember, it was taken from both sides of the line. . . . There was a general clean up of the rubbish of the station at that time. I did not examine it. . . . I cannot describe the contents of it. . . . It was a periodical cleaning up. I cannot say that it was an annual one." Mr. Boath, the engineer, explains that the public road runs behind the waiting room some distance back from it and at a higher level. The ground slopes down from the public road to the retaining wall, and between it and the back of the waiting room is the space where refuse gathers. A person standing on the road could throw things down into this space. I think it is no necessary part of pursuer's case to prove that the railway servants, painters or plumbers or others, used such rags as were found on the rubbish heap. It is enough if it is proved that the rubbish on the heap, including rags with paint on them, was deposited by them there without permission and for their own convenience, because that would in itself be a wrongful act wherever the rags came from. It was quite well known to the station officials that cows habitually grazed in the field in question. A railway station,

with its miscellaneous traffic, is a place where odds and ends will gather, and no one may be able to say where they come from. Kennedy, who struck me as an intelligent lad, says he has seen rags lying about the station. Both sides have proved that some show people were encamped with three caravans and engines for some three months in 1917 on a bare piece of ground quite close to the station, and that while there they did some painting work. The ground seems to have been cleaned up when they left, but if people of that sort lived there for some months it is hard to say that no odds and ends of rubbish may not have collected and found its way here and there about the station premises. In addition to the showmen mentioned above, it appears that others were there after them, and the evidence does not clear up the question how long they remained or what became of their refuse. The surfacemen who gathered and deposited the rubbish in the wood say no doubt that there were no rags in it, but at that time nobody was looking for or thinking about rags, and it is quite possible they may not have observed small pieces of rag among the rest of the rubbish. I do not think their evidence can fairly be put at higher value than that. There is no suggestion in the case that any person was seen or known to have at any time deposited rubbish in the plantation other than railway servants. Unquestionably they put down a good quantity of rubbish on the 30th of May or 1st of June. Unquestionably in my opinion rags with paint were found on that heap within a few days thereafter. And it is equally certain that both cows were poisoned by chewing and swallowing rags which came within their reach (wherever they were put down) not many days before they were eaten.

This last consideration is important in dealing with the evidence of defenders pointing to other places where the cows might have come in contact with rags. It is suggested that the showmen who had camped on the open triangular ground close to the station may have left rags with paint lying about and that the cows ate some of these. It is said the cows passed this place twice a day going to and returning from the field where they grazed, and that they were allowed to go pretty much as they pleased: what more likely than that they found the rags lying there? But the showmen who are proved to have done any painting there left in or about November, 1917. It is scarcely conceivable that the cows, passing and repassing twice a day on this short bit of road between the farm steading and the field, and being allowed leisurely to look about for anything to eat, would not have found and eaten the supposed pieces of rag long before June, 1919. Taking the defenders' evidence on this matter as

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uncontradicted, I think the suggestion is not reasonable. But the evidence is seriously contradicted. It was Kennedy who drove the cows back and forward to the field each day from 28th May, and I believe his evidence that he was careful to see that they were under control and did not eat things they should not eat. The stationmaster says they were always driven carefully.

Another suggestion, even weaker than the last, is put forward based on the fact that a tramway was run from a plantation in the neighbouring farm to the top of the embankment of the railway on the side where the field A adjoins the public road. It was for conveying timber down to the road near the railway bridge. It did not run through the field A; it was on the railway side of the fence separating the field from the embankment. The timber was brought down on bogies which sometimes lay when unused at the terminus near the wall. It is said some showmen did this haulage work with an engine, and that their camp was at the back of M'Lean's house at the far end of the plantation near the letter F in No. 14. All this happened in 1917. There is no evidence whatever that these tramway people ever deposited anything in the field. There is only a vague suggestion that, as they were working near it, they may have done so. Again, it is said the cows sometimes strayed out of the field A into the adjoining farm, the bounding wall or fence being more or less broken down. There is a good deal of contradictory evidence about the state of the wall. But, taking it at its best, M'Lean, the foreman surfaceman, states that the first time he saw the cows straying beyond the fence was on 30th May, 1919, and the last time was in the first days of June. They were in a corn field at the back of his house. The last date he can give is the 3rd or 4th of June. But that is too early to account for the illness on 9th June. And it does not account for the second cow's illness on 13th June. But this theory has another fatal weakness. When the cows did get through did they reach any place where there were poisonous rags? On the contrary, they got into a field of young growing corn and fed on the corn. And it appears the cattle of the neighbouring farmer, Mr. Kynoch, got into the same attractive field, and they, too, had to be driven off, but there is no hint that any of his cattle were poisoned or took ill.

Something is said by some witnesses about a manure heap in Kynoch's farm to which the cows might have had access, but there is no record for such a case. It is argued that Kynoch got town manure, and that poisonous things are often found in town manure, and that the cows were poisoned in that way. M'Lean says the manure came from Leith,

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and was deposited in a field near his house. But, of course, the manure would not be lying about in June. Cole, a railway servant, says the tenant got manure once, he cannot tell the year, "it is that long since." He knows it was spread on the ground, he remembers that being done. But it was spread not on the field next to M'Morran's field, but on the one next to that. There is no evidence that pursuer's or M'Morran's cows ever strayed into that other field.

It seems to me that all the defenders' suggested explanations are vague and pointless, and entirely fail to supply any reasonable explanation of the cows having been poisoned by eating rags with paint on them. No doubt the onus is on pursuer and not on defenders, but I think pursuer has built up a sufficiently strong case, and is entitled to recover from the railway company. There is no dispute as to the value of the cow. R. L. O.

July 23, 1921
Sheriff CROLE

EDINBURGH, 23*rd July*, 1921.—The Sheriff, having heard counsel for the parties on the defenders' appeal and considered the cause, adheres to the interlocutor appealed against and dismisses the appeal; finds the defenders liable to the pursuer in the expenses of the appeal, and remits to the Auditor of Court to tax the same (allowing fees to counsel), and to report, and remits the cause to the Sheriff-Substitute.

G. L. CROLE.

Note.—The pursuer who in 1919 was a shepherd at the farm of Tynehead, in Midlothian, sues for the sum of £52, being the value of a cow which belonged to him, and which he avers was poisoned and died owing to the fault of the defenders' servants. There is no dispute as to the value of the cow. In June, 1919, this cow, along with others, was grazing in a field adjoining the railway station of Tynehead on the North British Railway. On the 9th of that month the cow took ill and died the following day. There is no doubt that the cause of its death was acute lead poisoning, which it must have absorbed from twenty-four to forty-eight hours before its death. The pursuer's case is that the death of the cow was due to the fault of the defenders' servants depositing in a small plantation of trees forming part of the field in question a quantity of rubbish, including rags smeared with paint. The defenders maintain that the rags were not put there by their servants, and that it is possible that the cow died from eating rags which it had got elsewhere.

The Sheriff-Substitute has come to the conclusion on the evidence that the pursuer has proved his case, and that he is entitled to recover from the defenders. After carefully reading and considering the somewhat lengthy proof, I have arrived at the same conclusion, and agree with the

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Sheriff-Substitute's judgment. In his note the Sheriff-Substitute has given a full, careful, and accurate review of the evidence, and I do not therefore think it necessary to resume it.

It is admitted that on the 30th of May, 1919, the defenders' servants deposited several barrow-loads of rubbish in the plantation referred to, which they had collected from their platforms and waiting rooms on the station, and also from a vacant space between the back of one of the waiting rooms and the embankment at the station, where, as explained by Mr. Boath, the defenders' assistant engineer, refuse gathered. They did this without authority either from the landlord or tenant, and in the knowledge that the cows in the field were wont to graze in the plantation, and would therefore have access to the rubbish which they had deposited. I think it is proved that a few days after the cow was poisoned there was found in this rubbish rags smeared with paint. Some of these rags appeared to have been chewed by cattle. I think it is also proved that the pursuer's cow was poisoned by eating rags with paint on them. It is an important fact in the case that another cow belonging to the pursuer's employer which was grazing in the same field also died from the same cause on the 13th of June. After the death of the second cow the other cows were removed from the field for some days until the rubbish was entirely cleared away, and none of them took ill on being put back into the field.

Various suggestions were made by the defenders as to other places where and occasions when the cow might have picked up rags. The Sheriff-Substitute has examined each of these, and has rejected all of them as affording possible explanations of the death of the cow. In this I agree.

On the whole matter, I am of opinion that the evidence points irresistibly to the conclusion that the cow was poisoned, as averred by the pursuer, owing to the fault of the defenders' servants, and that the pursuer is entitled to succeed in the present action.

As regards expenses, the defenders maintain that the Sheriff-Substitute was in error in allowing fees to counsel for the pursuer, seeing that the defenders were not represented by counsel, that the sum in dispute was small, that the question for decision depended purely on matters of fact, and that no motion was made by the pursuer to allow fees to counsel. It is true that the sum in dispute is comparatively small, but the case is in the nature of a test case, as the decision in this case will settle the liability for the death of the second cow. Though the question for decision depended on matters of fact, the proof was a lengthy one,

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and the Sheriff-Substitute regarded the case as not free from difficulty, as the question of liability rested on circumstantial evidence. By the Codifying Act of Sederunt of 1913, M. II., Table of Fees, cap. 1, 16, the Court may allow fees to counsel as part of the expenses of the process without any motion being made. This provision differs from the provision in the Codifying Act of Sederunt as to the certification of skilled witnesses. Sanction for their employment must be obtained by motion (C.A.S. M. II., Table of Fees, cap 1, 10). The Sheriff-Substitute, having considered this matter and exercised his discretion in allowing fees to counsel, I do not think in the circumstances I would be justified in altering his decision. G. L. C.

For pursuer—Mr. W. H. STEVENSON, advocate, instructed by Messrs. J. & A. Hastie, Edinburgh.

For defenders—Mr. J. R. DICKSON, advocate, instructed by Mr. James Watson, Edinburgh.

SHERIFF COURT OF LANARKSHIRE.

No. 5.
LANARKSHIRE
Hart v Barras

THOMAS HART, *Pursuer;* MRS. R. A. H. BARRAS, *Defender.*

Process—Reponing—Sheriff Courts Act, 1907, *rule* 31.—*Held* that the £2 consigned with reponing note is payable to pursuer even although the reponing note had been lodged under a mistake as to the position of the process.

A reponing note was lodged in a process where a decree in absence had not been pronounced. The defender moved for authority to the Sheriff-clerk to repay the consigned money to her agent.

The Sheriff-Substitute (FYFE) pronounced the following interlocutor:—

Dec. 10, 1920
Sheriff FYFE

GLASGOW, 10*th December*, 1920.—Having heard parties' procurators upon defender's motion, No. 11 of process, refuses the motion; grants leave to appeal. T. A. FYFE.

Note.—The question which is here involved arises, I believe, for the first time in this Sheriffdom. I have therefore granted leave to appeal.

The question is in effect—whether rule 31 of the Sheriff Courts Act, 1907, is discretionary or peremptory. In my opinion it is peremptory. I have no discretion to prevent the pursuer uplifting the £2.

The defender, no doubt, in this instance had consigned this £2 under a mistaken idea that a reponing note was the proper machinery for enabling the defender to come into the process. But pursuer is not responsible for defender having made a mistake. The defender could easily have ascertained the fact that no decree in absence had been pronounced.

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Why she did not ascertain that fact before lodging a reponing note I am at a loss to understand, for she ought to have known that reponing is not competent at all unless where there has been a decree in absence pronounced.

The Sheriff Courts Act, 1907, altered the procedure in reponing as regards the application of the consigned money. The 1853 Act (sec. 2) had recognised the principle that the consigned fund in a reponing was of the nature of a penalty upon defender payable to pursuer, but the Sheriff had a discretion as to its being paid over, for the consigned fund was to be taken by the pursuer "unless special cause be shown to the contrary." The 1876 Act, sec. 14, also recognised that principle, but also gave the Sheriff a discretion. It is quite understandable why such a discretion should have been still retained to the Sheriff, for the consigned fund then might be as much as £5, and that, in all likelihood, would be more than was necessary to cover the expense the pursuer might be put to. But when the 1907 Act, sec. 31, fixed the consignation sum (that is to say, assessed the pursuer's expenses in the reponing procedure) at a slump sum of £2, it was no longer necessary to retain a discretion to the Sheriff to award the consigned fund to pursuer in whole or in part. The pursuer does not now require an order of Court at all to enable him to uplift the consigned fund, for it becomes his when it is consigned. It matters nothing what the Court may do upon the motion to repone. Obviously the Court can do only one of two things, repone or refuse to repone; but which is done has no effect upon the consigned money; for "in either case the pursuer shall be entitled to uplift the consigned money" (1907 Act, rule 31).

As the £2 in question belongs to pursuer by force of statute, the defender has no claim upon it, and this motion accordingly must be refused. T. A. F.

No appeal was taken.

For pursuer—PARTY.
For defender—Mr. JOHN JUBB (Messrs. Alexander Jubb & Taylor), Glasgow.

No. 6.
LANARKSHIRE
Craig & Co., Ltd. *v* Willox, Ltd.

JOHN S. CRAIG & CO., LIMITED, *Pursuers;* DAVID WILLOX, LIMITED, *Defenders.*

Sale—Offer and acceptance—Alternative offer—Order—Consensus in idem.—An offer to sell goods at a certain price *ex* factory, or at a certain higher price delivered, is an alternative offer, either alternative of which may be accepted; but it is not an order which must be certain and not alternative. Circumstances in which *held* that a concluded agreement of sale had not been made.

The facts of this case are sufficiently detailed in the

Feb. 8, 1921
Sheriff BLAIR

interlocutors of the Sheriff-Substitute (BLAIR) and the Sheriff (A. O. M. MACKENZIE), which were as follows:—

GLASGOW, *8th February*, 1921.—The Sheriff-Substitute, having heard parties' procurators and considered the evidence, finds in fact (1) that pursuers are paint and varnish manufacturers, and defenders are manufacturing chemists and drysalters, both in Glasgow; (2) that pursuers on 29th August, 1920, received a cable from a customer in Malta named Said asking quotation for soda crystals, packing and date of delivery at Malta; (3) that on 3rd September defenders, at pursuers' request, sent a sample of their manufactured article called "cleanser" to the pursuers, along with a quotation of price for same at £6 12s. 6d. per ton *ex* store, and at £6 17s. 6d. per ton delivered; (4) that the defenders pointed out to the pursuers that they could not supply soda crystals, which was what the pursuers asked for, but that they dealt in cleanser, an article of a similar kind to soda crystals; (5) that "cleanser" in its chemical constituents does not differ materially from soda crystals, but for commercial purposes is a widely different article; (6) that on 4th September the pursuers ordered from the defenders 16 tons (increased to 20 tons on 8th September) of "cleanser" at the prices quoted; (7) that these orders by pursuers (Nos. 4/2 and 4/3 of process) are in the following terms:—"Please forward the undernoted goods—

> "16 tons cleanser at £6 12s. 6d. per ton net *ex* store (x4) or at £6 17s. 6d. per ton delivered, as per your letter of 3rd inst.";

(8) that said orders are incomplete and ambiguous in respect that they contain a request to *forward* goods without specifying which price, *ex* store, or delivered, the pursuers were willing to pay; (9) that no date for delivery is mentioned by the pursuers in the said orders; (10) that pursuers purposely refrained from expressly accepting either price, or mentioning delivery, in order to suit their own convenience in arranging with their Maltese client, and arranging for packing and shipment; (11) that pursuers did not inform the defenders that the prospective order of 20 tons was for shipment abroad, export, which if the defenders had known, they were bound by trade agreements with the sellers of the raw material to have refused; (12) that on receipt of pursuers' order for 16 tons—"please forward"—the defenders at once by phone pointed out to pursuers that the order was not in proper form, and that they required instructions as to which price had been accepted, and also as to delivery, when and where; (13) that the pursuers neglected to clear up this ambiguity or to give further instructions as

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to delivery; (14) that the defenders thereupon by letter of 16th September (No. 4/4 of process) wrote to pursuers "cancelling the orders we have on hand from you"; (15) that the pursuers thereafter, on 24th September, purchased from Messrs. Allan Clark & Co. 20 tons soda crystals at £9 per ton—£180 as against the alleged contract with defenders (£132 10s.), and now claim the difference as damages for breach, viz., £47 10s.: Finds in law that no completed contract existed between the parties, and that the defenders were entitled on 16th September, 1920, to cancel the orders given by the pursuers. Therefore assoilzies the defenders from the conclusions of the action; finds the pursuers liable to defenders in expenses; allows an account thereof to be given in, and remits same to the Auditor of Court to tax and report, and decerns. P. J. Blair.

Note.—The settlement of this dispute turns on the form of the pursuers' orders for goods from the defenders, and the subsequent actings of parties after its receipt by the defenders.

The main facts are set out in the interlocutor, and I need not repeat them here.

I do not think it matters very much whether this deal is to be regarded as a contract or simply as an order in trade, although there is a clear enough distinction between the two. Bell's Principles, 9th ed., sec. 81, says—"An order in trade must be absolute, and neither uncertain, conditional, nor alternative, otherwise it becomes a mere offer." If the deal in this case is an order in trade, which I think it is, pursuers' orders (Nos. 4/2 and 4/3 of process) clearly do not fulfil the conditions enumerated in the textbook. They are not absolute as to price; they are not certain as to delivery if one takes the opening words, "Please forward," in conjunction with the two alternative prices stated below, one for delivery and one not for delivery.

Mr. Willox, senior, chief of the defenders' firm, an old gentleman of seventy-five, with a lifelong experience of the trade, and at one time I think a bailie of this city, and whose evidence I accept without reservation in all particulars, says most distinctly and emphatically that whenever he got the orders he raised the question with the pursuers as to what they meant—what price they were accepting and what about delivery, where and when. The defenders had the goods ready for delivery, and the custom is for the buyer to take delivery in a reasonable time—three, four, or five, or even ten days, unless otherwise agreed. The defenders day after day telephoned pursuers about this, and got no satisfaction. Mr. Willox says he could not be expected to keep the stuff indefinitely against this indefinite order of the

pursuers, with whom he was doing business for the first time; and he came to the conclusion he was being fooled or humbugged by the pursuers, and that they were only using him to suit their own convenience. I think Mr. Willox was quite right in his view, that the pursuers were bound to satisfy his inquiries, which they did not.

I know that the pursuers' story is completely different, but there is nothing to go on for me to reach a decision except the written documents produced. I cannot pay the least attention to the gist of alleged telephone conversations not recorded. This method may be convenient in business, but it is not evidence here.

If the deal is to be described as a contract, or offer and acceptance, the same criticism as applies to an order in trade would apply also. A contract could not be complete if some of its essentials are wanting, say the acceptance of one or other of alternative prices. To accept both will not do, unless it is clearly shown what is meant. The defenders raised the ambiguous point at once, and no notice was taken of it. It is, therefore, clear there is no *consensus in idem* with the pursuers. In this case delivery was of the essence of the contract, and that has been left out entirely by the pursuers' fault.

There is no doubt that the usual rule of an order in trade is that when the person who offers for sale cannot supply he must intimate to the purchaser that he cannot, by return of post, or as soon as possible, otherwise the order stands. But this is just what defenders did in a more roundabout way at once on receipt of the order—"We can't supply unless you tell us what your order means, and what you want done about delivery."

If it is an offer and acceptance, then the defenders here can withdraw if the pursuers did not accept in time. In my opinion, the pursuers (the acceptors) did not accept all the conditions in time. I may refer to Lord Moncrieff's opinion in *Smith* v. *Colquhoun's Trustees*, 3 F. 981—"There is no doubt that at common law a person who has made an offer to sell is entitled to withdraw the offer at any time before acceptance, unless he has bound himself to leave the offer open for a specified time." I take it that this dictum applies equally to a case where the acceptance has not been complete; also, the defenders did not leave the offer open for a specified time.

There are other circumstances in this case which one must notice. Pursuers' Maltese client wanted "soda crystals," and pursuers buy "cleanser." When they buy against Willox's contract from Allan Clark they buy "soda crystals." Chemically they are much the same thing; in fact, almost identical, but, as Mr. Willox says, "commerci-

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ally there is a mighty difference." So there is. "Cleanser" is a dirtier looking article, whereas soda crystals are clear and clean. In fact, both are really the common washing soda known in every household; but whereas soda crystals will do all that "cleanser" will do, "cleanser" will not do all that soda crystals will do. For example, "cleanser" would not on account of its impurities (tinged with iron or other colouring matter) be used for washing fine linen. The price of both articles is much the same, soda crystals being about 2s. 6d. a ton dearer. I need not go into the reasons why the defenders call their stuff "cleanser," except to say that it is a way out of a trade embargo on them by Brunner, Mond, & Co., who supply them with raw materials, not to sell soda crystals. There seems to be another embargo about selling exports. It is clear from the evidence, however, that to sell for export commands a higher price than for sale on the home market—a difference of about £2 a ton more for export. The pursuers did not tell the defenders they wanted "cleanser" for export. They would not have got it. But when they had to fill up the cargo space already booked, Allan Clark knew it was for export, and charged them accordingly. I do not think in any case they would be entitled to put this £2 a ton extra against the defenders. It was a different contract they entered into with Clark, both as to the article and as to the price, arising from circumstances they had not disclosed to the defenders. My view is that the pursuers have throughout the whole deal overreached themselves a little, and they must bear their own loss. It was not caused by any fault of the defenders, and I hold they must be assoilzied.

One item which, I think, goes some way to establish the defenders' *bona fides* in this deal is that they had the 20 tons on hand ready to deliver within a reasonable time, and also, when they sold it to get storage space and to satisfy Davidsons, an old customer, they sold it for 2s. 6d. a ton less. P. J. B.

March 18, 1921
Sheriff Mackenzie

Glasgow, 18*th March*, 1921.—The Sheriff, having considered the cause, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute dated 8th February, 1921, complained of, and decerns; finds the pursuers liable to the defenders in the expenses of the appeal; and remits the cause to the Sheriff-Substitute, with power to decern for the expenses now found due. A. O. M. Mackenzie.

Note.—I agree with the Sheriff-Substitute that the defenders' quotation was alternative as to price and place of delivery, that is, they offered to sell to the pursuers

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"cleanser" at £6 12s. 6d. per ton *ex* their works, or at £6 17s. 6d. per ton, delivered at the pursuers' works. That was a perfectly good offer, for an offer may be alternative, but it is different with an order, which must be certain and not alternative. Now, in the so-called orders the pursuers left it quite uncertain whether they wished the goods sent to them or proposed to take delivery of them at the defenders' store, and as a consequence they left it uncertain at which price they were buying. Their so-called orders, accordingly, in my opinion, were not good as orders, but they might, I think, have been treated as offers if the defenders had chosen so to treat them That is to say, the defenders would, in my opinion, have been entitled to reply that they accepted the order for the quantity named to be delivered at their own works, or that they accepted it for delivery at the pursuers' works, but the defenders were not bound to take this course, and were entitled, I think, to do as they did, that is, ask the pursuers to explain the terms of their order and to give them definite instructions, and, having tried for a week to obtain instructions and failed, the defenders were, in my opinion, entitled to sell the "cleanser" which they had on hand, and subsequently to reject the pursuers' definite order when it finally arrived. A. O. M. M.

For pursuers—Mr. ARCHD. BROWNLIE, Glasgow.
For defenders—Mr. WM. ARMOUR, Glasgow.

No. 7.

LANARKSHIRE

Bain, &c. *v* Riddell's Trustees, &c.

WILLIAM URQUHART BAIN and Another, *Pursuers*; Rev. HUGH RIDDELL'S TRUSTEES and Others, *Defenders*.

Heritable security—Foreclosure—Heritable Securities Act, 1894—*Titles to Land Act*, 1868, *sec.* 119—*Transmission of personal obligation—Sufficiency of intimation.*—A property was burdened in 1871 by a bond and disposition, and in 1875 was sold, the bond being taken over and transmitted against the purchaser, but without discharge of the personal obligation of the former owner, the original granter of the bond. In proceeding to sell under the bond the bondholder gave the requisite intimation to the representatives of the then existing proprietor, against whom the bond had been transmitted, but did not give intimation to the representatives of the original granter of the bond. In subsequent procedure for foreclosing under the Heritable Securities Act, *held* that the intimation given was sufficient.

In this petition under the Heritable Securities (Scotland) Act, 1894, to extinguish the right of redemption in a bond, remit was made by the Sheriff-Substitute

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(Lyell) to Mr. Robert Mearns, writer, Glasgow, to examine the titles and inquire into the procedure and report. Mr. Mearns' report, which fully states the facts and circumstances and the legal question involved is as follows:—

The reporter having accepted the remit made to him by interlocutor of Court of date 21st March, 1921, and having since examined the titles produced, and other papers relative to the pursuers' intromissions with the rents of the security subjects from and since Whitsunday, 1913, now begs humbly to report—

(1) That the property title submitted, which consists of an extract of a disposition by the original feuar, William Kyle, plasterer, Maclean Street, Glasgow, in favour of the Reverend Hugh Riddell, who resided at Valeview Terrace, Langside, Glasgow, dated 15th, and recorded in the appropriate division of the General Register of Sasines on 17th May, 1875, is sufficient, in absence of improbation, to instruct a good prescriptive title to the subjects described in the petition;

(2) That prior to said disposition the said William Kyle burdened said subjects with a bond for £750, granted by him in favour of the trustees of the Reverend William Bain, of the Chapel of Milton, in Markinch, dated 15th, and recorded 19th August, 1871;

(3) That, subsequent to his acquisition of said subjects under said disposition, the said Reverend Hugh Riddell burdened them with a second bond for £200, granted by him to the trustees for Mrs. Agnes Paton, of Harmere, Cheshire;

(4) That these two bonds are the only subsisting bonds affecting said subjects, and are respectively held by the pursuers, and the defender, Mrs. Mary Wilson Pitt or Niven;

(5) That the pursuers' title to the said bond of £750 held by them is valid, and effectually vests them not only in the said subjects thereby conveyed in security, but also in the personal obligation therein contained, by which the said William Kyle bound himself and his "heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay" said sum of £750, with interest thereon at the rate of 5 per cent. per annum "during the non-payment of the same";

(6) That the said principal sum of £750 remains unpaid, and, in addition, there was due, as at Martinmas, 1920, a sum of £203 9s. 6d. of accumulated arrears of interest, conform to the annexed statement rendered by pursuers as showing their intromissions with the rents of said subjects under and by virtue of a decree of maills and duties obtained at their instance, dated at Glasgow, 25th November, and extracted 4th December, 1913;

(7) That in 1919 the said Reverend Hugh Riddell being dead, and no title having been completed by any successor to his reversionary interest as proprietor of said subjects, the pursuers resolved to call up their bond, and in pursuance of that resolve competently presented a petition under sec. 16 of the Heritable Securities (Scotland) Act, 1894, for warrant to intimate the statutory demand for payment by schedule delivered edictally "addressed to the heirs and representatives of the said Reverend Hugh Riddell . . . or to such person or persons by name, or in his or their representative character, as the Court might prescribe after such inquiry, if any, as the Court might think fit," and on that petition the Court, on 19th January, 1920, "of consent granted warrant to and authorised the petitioners to intimate as craved";

(8) That thereafter the pursuers, on 28th January, 1920, gave edictal premonition for payment to (1) "the heirs and representatives of the said Reverend Hugh Riddell," and (2) to the defender, Mrs. Mary Wilson Pitt or Niven, and on 4th February following they intimated their demand to the defenders, David Hugh Riddell Niven and Alexander Reid, by formal schedules served on them;

(9) That payment not having been made as required, the pursuers, after due advertisement, brought the subjects to exposure on 15th September, 1920, at the upset price of £950, and on 20th October, 1920, at the reduced upset price of £750, and no offer was made on either occasion;

(10) That pursuers then resolved to foreclose on their bond, and on 1st March, 1921, presented the present petition under sec. 8 of said Act in order to extinguish the right of redemption contained in said bond, and so to transform their infeftment

thereunder from a security investiture into an absolute and irredeemable proprietary title to the subjects;

(11) That, as the last exposure of the subjects was "at a price not exceeding the amount due under the said security . . . exclusive of the expenses attending the exposure or prior exposure," the pursuers, if they have effectually called up their bond, are entitled to the decree they crave.

The question therefore for the consideration of the Court is whether the pursuers, in the notices given by them of their demand for repayment of their bond, have complied with the provisions of sec. 119 of the Titles to Land Consolidation (Scotland) Act, 1868. No notice was given to the granter of the bond or his heirs or representatives. Was that necessary? Sec. 119 requires "the demand for payment," in statutory form, to be "intimated to the granter" of the bond, and sec. 3 provides that the term "granter" as used in the Act "shall extend to and *include* the heirs, successors, and representatives of such . . . granter," and the term "successors" is defined to "*include* disponees and assignees, legal as well as voluntary." On the law as embodied in these statutory provisions Lord President Inglis, in the leading case of *Stewart and Others* v *Brown and Others*, 1882, 10 R. 192, at p. 202, says, "I am well aware that a requisition must be served on the debtor in the bond, and if the debtor has ceased to be owner of the estate, then intimation must be made to the present owner that his estate is to be brought to sale. I know of no law that requires premonition to be made to any one else except these two." The reason for premonition to these two seems obvious. Burns, in his Conveyancing Practice, 2nd edition, p. 514, says, "Notice must be given to (1) those liable for the debt, whether personally or in a representative capacity; and (2) the proprietor or proprietors of the property or any part of it. The former, though not owners, are interested to see that there is no deficit, and the latter, though not personally liable, are, of course, interested when it comes to be a matter of selling their property, and any surplus is theirs." See also Craigie's Heritable Rights, 3rd edition, 1899, p. 962, and his Elements of Conveyancing, 1908, p. 329, where he says, "Before a sale can be carried through by a creditor under a bond and disposition in security in its modern form, he must give three months' intimation to the debtor and to the proprietor for the time being of the property that he requires repayment." The Heritable Securities Act in no way affects the necessity for notice to

the debtor. Sec. 8 of that Act presupposes regularity in all procedure up to and including exposure, and the underlying reason for notice to the debtor, notwithstanding his divestiture of the property, is recognised in the provision of sec. 9, that " the personal obligation of the debtor shall be reserved in full force and effect so far as not extinguished by the price at which the lands have been acquired " by the creditor. In this case the pursuers ask the Court to declare that they have right to, and are vested in said subjects as absolute proprietors thereof, at the price of £750. To the extent of that price the personal obligation in the bond would be wiped out by the decree craved, but the obligation of the debtor and his heirs, executors, and representatives would still remain operative and prestable for arrears of interest, liquidate penalty, and expenses as provided for in the bond. In the absence of notice to the debtor, the reporter knows of no warrant for any such result.

If the objection based on want of notice to the debtor or his representatives be valid, a second objection arises and strikes at the instance of the petition as defective in respect that neither the debtor nor his representatives have been called for their interest as defenders.

In order, if possible, to meet these objections the reporter has cast about for any suggestions which might be helpful. Two have occurred to him, and are submitted for consideration by the Court. The first is, that the pursuers should plumb the possibility of the sequestration of the debtor prior to the date of the first exposure. If that possibility were ascertained to be an actual fact, the personal obligation in the bond would no longer subsist, and both objections would at once disappear. The second suggestion (offered on the assumption that there has been no sequestration) is, that in order to cut down the interest of the debtor and his representatives the pursuers should grant and record, and *produce in process*, *an extract* of a discharge of the debtor's personal obligations in the bond, so far as not extinguished by the price to be specified in the decree. This suggestion, however, even if adopted, would not, in the reporter's view, altogether eliminate the risk of future challenge of the decree on the ground that prior notice not having been given to the debtor, there could have been no lawful exposure effective to support the decree. In connection with this point it is to be observed that the title acquired by a creditor under the Heritable Securities Act gets no special protection from the terms of that Act, and that by sec. 10 the protection given even to a purchaser from such creditor is restricted to objections to " the regularity of the proceedings " under that Act, and in no way

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covers irregularities (even if the failure to give notice could be counted an irregularity) in the steps of procedure antecedent to and necessary to a valid exposure.

It has been suggested to the reporter that in the matter of intimation of the demand by the pursuers for repayment of their bond, all that was required of them was conformity to the terms of the special warrant granted to them by the Court. The reporter cannot accept that view. Under the petition upon which that warrant was granted the Court, as it appears to the reporter, dealt only with the notice to be given to the persons then in right of the proprietary interest in the security subjects, and did not consider, and was not called upon to consider, the question of notice to the debtor in the bond or his representatives, and much less the competency of setting aside the provisions of the Act of 1868 requiring notice to be given to them.

Rob. Mearns.

The Sheriff-Substitute, after considering the report, disposed of the case by the following note, in which he dealt with the question raised by Mr. Mearns:—

May 2, 1921

Sheriff Lyell

Note.—The question raised by the reporter arises in the following circumstances:—

In 1871 Mr. Kyle, the then proprietor of the subjects in question, burdened them with a bond and disposition in security containing the usual personal obligation and a disposition in security for £750. In 1875 he disponed the subjects to the Reverend Hugh Riddell, still burdened with the bond, the disponee being taken bound to pay the bond by transmission of the personal obligation in terms of sec. 47 of the Conveyancing Act of 1874. Having determined to call up the bond, the pursuers, who are now in right of it by various transmissions, gave the statutory intimation to the representatives of Riddell, but did not give intimation to the representatives of the original granter Kyle.

The question is whether, in the circumstances, such intimation to the representatives of Kyle is required by the terms of the Titles to Land Act, 1868, sec. 119. By that section three months premonition must be made to the "granter" of the bond. The granter is defined by sec. 3 as extending to successors, and successors means, *inter alia*, disponees. Kyle being the disponer and Riddell the disponee, the question is whether one or other or both are included in the term "granter" in the 119th section of the Titles to Land Act.

In the case of *Simpson* v *The Reversionary Trust*, 1916, 32 Sh.Ct.Rep. 78, the late Sheriff Millar, then Sheriff of Lanarkshire, differing from the opinion that I then ventured

to express, came to the conclusion that, in circumstances like the present, intimation to the representatives of Riddell is sufficient, and that intimation to the representatives of Kyle is not required. Upon reconsideration I agree with that opinion and with the reasons stated by Sheriff Millar at pp. 83 and 84. It appears to me that Kyle's obligations under the bond were effectually transmitted to Riddell, and that his representatives have no interest to receive intimation. The person to whom intimation must be given is the person having the real right in the property, not the person who has merely granted a disposition which appears in the progress of titles.

The suggestion that the representatives of Kyle have an interest in respect that they might still be held liable under the personal obligation in the bond appears to me to admit of a three-fold answer—(1) That by virtue of the 47th section of the 1874 Act their liability was transmitted to Riddell in 1875; (2) that, as no intimation has now been made upon them, the pursuers here and their successors would be personally barred from insisting on the liability of Kyle's representatives under the personal obligation; and (3) that in any event that obligation has prescribed, unless you are to take it that interest paid on the bond by Riddell and his successors was interest, not only on the heritable security, but interest under Kyle's personal obligation. On the whole matter I am satisfied that the intimation here given was sufficient compliance with the provisions of the statute. W. D. L.

For pursuers—Mr. J. J. CRAIK HENDERSON (Messrs. Scott, Craig, & Brown), Glasgow.

SHERIFF COURT OF MIDLOTHIAN.

Mrs. ANNIE WARDHAUGH and Others, *Pursuers*; WILLIAM BALDIE (Thomas W. Kay's Trustee), *Defender*.

Succession—Trust—Payment of debts—Liferent to truster's widow—Deathbed and funeral expenses of widow.—Held that the deathbed and funeral expenses of a testator's widow, the liferentrix of his estate, were a proper charge on his estate, the widow having died in indigent circumstances, and having no separate estate of her own.

The deceased Thomas Williamson Kay, aerated water manufacturer, Leith, who died on 13th December, 1904, by his settlement directed his trustees to pay his debts, allow the liferent of his estate to his widow, and on her death after payment of certain legacies to divide the residue among his children. The

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defender as sole surviving trustee of the testator made up account of the residue which showed a payment by him of £27 14s. 9d., being accounts incurred in connection with the deathbed and funeral expenses of the truster's widow, the liferentrix. The pursuers (four of the children) objected to the deduction as being a payment which had no relation to the estate of the deceased, and which the defender had incurred without instructions from the parties interested. The defender declined to pay pursuers their respective shares of residue, unless they agreed to the inclusion of above item in the discharge side of the account. The present action for count, reckoning, and payment, was thereupon raised, in which the Sheriff-Substitute (R. L. Orr) and the Sheriff (Crole) gave judgment as per the interlocutors following:—

Feb. 8, 1921

Sheriff Orr

Edinburgh, 8*th February*, 1921.—The Sheriff-Substitute, having heard the agent for the pursuers and counsel for the defender and considered the cause, sustains defender's first, second, and third pleas in law; repels pursuers' pleas; finds it unnecessary to deal with the first crave; grants decree against defender for payment to each of the pursuers of the sum of £31 9s. 7d.; finds the pursuers liable conjunctly and severally to the defender in expenses, and remits to the Auditor of Court to tax the same and to report.

R. L. Orr.

Note.—This litigation presents the unedifying spectacle of children quarreling over their mother's grave about the expenses of her burial. But bad as the pursuers' position is in morals, their position in law is, in my opinion, no better. They are four married daughters of the late Thomas Williamson Kay, who carried on business in Leith, and they sue the surviving trustee under his trust disposition and settlement for the balance said to be due to each of them out of his trust estate. The trust accounts have been produced. The only disputed item in them is a sum of £27 14s. 9d., being the amount incurred in connection with the deathbed and funeral expenses of the truster's widow, who was mother of the pursuers. The pursuers claim that that sum should be deleted from the account as a bad charge against the estate. The defender, the trustee, has already paid the accounts, and claims that it is a good charge upon the trust estate. If he is right, the amount which each pursuer (and each of the other children, of whom there are nine in all) will have to pay as her share of the funeral expenses will be £3 1s. 7d. It is admitted there is still a small balance due

to each pursuer; the only question in dispute is whether that sum is £34 11s. 2d. or that sum less £3 1s. 7d.

Under the settlement the widow was entitled to a liferent of the estate, which on her death was to be divided, less certain legacies, into nine shares—one for each child.

It appears that the amount available for the support of the widow was very small—so small that at the date of her death she left nothing. The case was argued by the parties on the footing that she died indigent. The widow, near the end of her life, was taken to Glasgow, and remained there in the house of a married daughter. At her own urgent desire, her body was conveyed to Leith and laid beside her husband's. The arrangements were carried out by the defender, as trustee, in consultation with the daughter in Glasgow. The pursuers complain that they were "improperly ignored" in regard to the funeral arrangements, and bad feeling seems to have arisen in consequence of this.

In the circumstances stated, it appears to me that the deathbed and funeral expenses of the truster's widow are a debt properly chargeable against his estate. The husband was bound to have met those expenses if his wife had predeceased him and had no means of her own. Equally, his estate was chargeable with them if he predeceased her and the widow died without means of her own. In either case such expenses were a debt against him or his estate arising out of the fact that she was his wife. The first purpose of the trust was to pay the truster's just and lawful debts, and it appears to me the widow's funeral expenses come within that category. That appears to be the ratio of the old case of *Heriot* v. *Blyth*, Mor. 5924, where it was held that the heir was chargeable with the expenses of burying his predecessor's widow. More (Notes to Stair, p. xxv., sec. 30) thinks this case would require to be reconsidered, but apparently it still stands. In *Auchinleck* v. *Dinmuir*, M. 11,634, the funeral expenses of a wife predeceasing her husband were held to be a privileged debt only against her own estate, not against her husband's creditors. It was common ground that the duty of a man to bury his wife rested on the *debitum humanitatis*, the only question was as to the preference. In the present case there is no question of preference. The question arises solely with the children. In *Spalding* v. *Spalding's Trustees*, 2 R. 237, the Court had to consider the liability of a father's estate for the aliment of a posthumous son. Lord Ardmillan uses as an illustration the case of a claim for deathbed and funeral expenses of a truster who had granted a trust disposition of his estate to trustees, the deed being delivered to them on the day of its execution, and being recorded in the Register of Sasines within three months

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thereafter. The granter died five months after executing the deed. One of the trust purposes was to pay all debts due by the granter at the date of the deed. The expenses in the illustration used were a debt subsequent to the deed, "But the debt," his lordship says, "the obligation imposed, as Mr. Bell says, by nature and by decency to furnish from his estate if he had any the means of decent burial, existed at the date of the deed and continued until he died." Here the husband's obligation to furnish from his estate, if he had any, the means of decent burial of his wife, who had no means, whether it be regarded as arising from the relationship or *ex debito naturali*, existed at the date of the trust deed and continued until she died.

The case of aliment of a posthumous child which arose in *Spalding* presents a certain analogy. If the deed was a *mortis causa* deed, as the majority of the Court held, the child was *in utero* at its date, and was therefore to be held as *pro nato*. But even if the deed was not *mortis causa*, the debt was a debt by the law of nature. If the trust estate be not liable for the widow's funeral expenses in the circumstances which occurs here, a conclusion adverse to the pursuers' claim seems to be reached along another road. If a widowed mother died indigent, her children are bound to pay her deathbed and funeral expenses, as they are bound to aliment her in life, she being indigent and they being financially able. It follows that the pursuers are liable to pay their share of those expenses.

As it happens, the defender and another daughter of the deceased arranged about the funeral, and the defender has paid the bill; it is quite irrelevant that the pursuers' feelings were hurt because they were not sufficiently consulted. Defender has now a claim against each of them for her share. There is no relevant objection to the amount; all that is said is that the funeral arrangements were "unnecessarily costly"—a mere grumble.

Defender therefore is entitled in paying to each her portion of the balance of the estate to deduct what she owes as her share of the funeral expenses. The law will not allow her to get payment in full of the one without payment by her of the other, that is to say, without deducting the other. Each pursuer will therefore be entitled to the sum of £31 9s. 7d. R. L. O.

March 16, 1921
Sheriff Crole

Edinburgh, 16*th March*, 1921.—The Sheriff, having heard counsel for the parties on the pursuers' appeal, and having considered the cause, adheres to the interlocutor of the Sheriff-Substitute appealed against, and dismisses the appeal; finds the pursuers liable conjunctly and severally in

the expenses of the appeal; and remits to the Auditor of Court to tax the same (allowing fees to counsel), and to report; and remits the cause to the Sheriff-Substitute.

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Wardhaugh, &c. *v* Baldie
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Sheriff CROLE

G. L. CROLE.

Note.—The Sheriff-Substitute in his Note has fully narrated the facts of this case, and, as I agree entirely with his judgment, I do not think it necessary to resume them. The only item in the trust accounts to which exception is taken by the pursuers is a sum of £27 4s. 9d., which is the amount paid by the defender out of the trust estate in connection with the deathbed and funeral expenses of the truster's widow, who was the mother of the pursuers. The pursuers maintain that these expenses do not form a proper deduction from the trust estate, and should be deleted from the trust accounts. I am of opinion that these expenses are a proper charge against the trust estate, it being admitted that the widow died in indigent circumstances, without leaving any estate. In my opinion, a husband is bound to aliment his wife during his lifetime, and, if she predeceases him, to pay the expenses of her funeral. I think it follows that, if the husband predeceases the wife, and the wife dies leaving no estate, the husband's estate, if in existence, is liable for these expenses. It is a debt due by his estate. I think this view is supported by the principle underlying the case of *Heriot* v. *Blyth*, November, 1681, M. 5924, and the other cases cited in the Sheriff-Substitute's Note, as well as the case of *Anderson* v. *Anderson's Trustees*, 1 F. 484. There is, moreover, no substance in the pursuers' case, for they admit that, as individuals, they are liable for their share of these expenses. The only other question is, were these expenses reasonable? I do not think there is a revelant averment that they were unreasonable. G. L. C.

For pursuers—Messrs. BLACKSTOCK & ROMANES, Edinburgh.
For defender—Messrs. MACKENZIE & FORTUNE, Edinburgh.

SHERIFF COURT OF DUMBARTONSHIRE.

WILLIAM SINCLAIR, *Applicant;* ROBERT L. MACDONALD, *Respondent.*

No. 9.
DUMBARTONSHIRE
Sinclair *v* Macdonald

Landlord and tenant—Increase of Rent, &c. (Restrictions) Act, 1920, *sec.* 2 (1) (c) *and* (d)—*"not reasonably fit for human habitation, or otherwise not in a reasonable state of repair"—Refusal of landlord to make interior decorations—Certificate of sanitary inspector.—Held* that the refusal or failure of the landlord of a dwelling-house to replace wall-paper which had been removed or damaged when repairs to plaster were being made was not a defect in respect of which it could be

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found that the house was not in all respects reasonably fit for human habitation, or otherwise not in a reasonable state of repair, so as to entitle the tenant to an order suspending increase of rent.

The interlocutors of the Sheriff-Substitute (A. J. P. Menzies) and the Sheriff (Macphail), given below give a sufficient account of the facts and circumstances of the case:—

Nov. 23, 1921

Sheriff Menzies

Dumbarton, 23*rd November*, 1921.—The Sheriff-Substitute, having heard parties' procurators upon the proof and considered the whole cause, finds in fact that the defects in wall-paper in the house of which the pursuer is tenant mentioned in the certificate, No. 2/1 of process, have not been remedied: Finds in law that (1) the defender is liable for the whole of the repairs to said house; (2) the repairs mentioned in the said report are necessary repairs; (3) the defender is liable in the execution of these repairs. Therefore suspends the increases of rent, amounting to 6s. 10d. sterling per month, mentioned on record till the Court is satisfied that the said necessary repairs have been executed; finds the pursuer entitled to expenses; allows an account thereof to be lodged, and remits the same when lodged to the Auditor to tax and to report; and decerns.

A. J. P. Menzies.

Note.—The pursuer in this case seeks an order to suspend an increase of rent imposed upon him by the defender by virtue of the 2nd section, sub-sec. 1 (*c*) and (*d*), of the Rent Act of 1920. The pursuer bases his claim upon a certificate of the sanitary inspector for the burgh of Clydebank, who is admittedly the authority for the purposes of this case that is referred to in that section. That certificate, which is dated 15th July, 1921, states that the inspector examined the house in question, and found that it was "not in all respect reasonably fit for human habitation, or otherwise not in a reasonable state of repair." The certificate then specifies the defects constituting this condition of the house.

The case was tabled on the first Court day in vacation, and was continued on the defender's motion to the second Court day without any order upon the application having been made. On that date the defender asked for a proof to show that the necessary repairs in so far as he was, in a question with the tenant, liable for them, had been executed, and that proof has been led. Some, but not all, of the defects mentioned in the statutory certificate have been remedied. The defender says that those which he has not remedied are not necessary repairs for which he is liable. The first question raised is—are necessary repairs in the

sense of this statute the repairs required to remedy the defects specified in the statutory certificate? I think that the position upon the terms of the statute is not in doubt. It is open to the Court, in the absence of a certificate by the sanitary authority, to be satisfied "otherwise" as to the condition of the house. The sanitary authority is therefore not the statutory arbiter of what are necessary repairs, and "necessary repairs" are not all or only those which that authority sees fit to specify in its statutory certificate. In a case where the Court has been "satisfied" as to the condition of the house by a certificate of the sanitary authority propounded by the tenant as correct, he would, as a rule, be barred in a question with the landlord from objecting to the Court being satisfied by a report of the same authority that the defects specified in the original certificate had been remedied. But the landlord would not be bound by the refusal of such a report, and would be entitled to prove in ordinary form that the necessary repairs had been executed. That is the position here.

The next question is—has the landlord succeeded in proving that the necessary repairs have been executed by him? The defender entered upon occupation of the house on 28th April, 1920. After entry, he complained that the plaster was broken in parts, and the landlord accepted the position and had the plaster repaired. In order to have these repairs to the plasterwork executed, a very noticeable portion of the entire wall-paper had to be removed. The pursuer contends that the replacement of the removed and damaged wall-paper is a necessary repair for which the landlord is liable. Necessary repairs are defined by the statute to be those necessary to put the house in a reasonable state of repair. The defender's position is that the house in its present condition is in a reasonable state of repair. Expert evidence was not spared by the defender in order to show that the house in its present state is in a reasonable state of repair. Of these witnesses, one, Dr. Taylor, admitted that he spoke only from the point of hygiene, which was not in question. Another witness, Chisholm, gave his personal views on the question of repairs, but these opinions did not appeal to me as being based on any principle allowing me to judge of their soundness. A third witness, Crone, a Glasgow house factor of thirty years' experience, admitted that the method adopted by the landlord in this case with regard to the damage to the paper done by the plaster repairs was not "the usual way to repair a paper." A fourth witness, Steele, a London surveyor, was more entertaining than helpful in the witness-box. No suggestion was made that the destruction of the wall-paper

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Nov. 23, 1921

Sheriff Menzies

was reasonable wear and tear, or due to the negligence or culpable act of the tenant. None of the defender's witnesses would squarely face the assertion that the paper did not require repair to make the house acceptable as to repair to a normal tenant looking for a house in normal times. I can find no other principle than this on which to test this question of reasonable state of repair. I therefore reach the conclusion that the landlord has failed to prove that the necessary repairs have been executed in respect of his failure to remedy the specified defects in the wall-paper. If, then, the restoration of this wall-paper was a necessary repair, the next question is—who is liable for the repair? Now, increases of rent under paragraph (*d* (*i*)) of the 1st sub-sec. of sec. 2 of the Rent Act of 1920 are permitted only where the landlord is responsible for the whole of the repairs. By making the increases under this paragraph the landlord bars himself from denying this obligation. Therefore, if liable for the whole of the repairs, he must be liable for this one. It may be—according to the evidence it probably is—correct to say that the paper cannot be repaired short of repapering, or of a substitute form of decoration, such as distemper, which the tenant does not object to. But the proved onerosity of an obligation in practice is no reason for denying its existence in law. It must be distinctly understood that, in accepting the procedure adopted by the parties in the case, I am not expressing any opinion as to its correctness. It must be further understood that, in supporting the contention of the pursuer in this case, I am doing so upon the facts found in the proof taken, and not upon any general principle. I therefore make an order suspending the increase in question till I am satisfied the repairs to the wall-paper mentioned in the report of the sanitary inspector are carried out.

A. J. P. M.

Jan. 20, 1922

Sheriff Macphail

Dumbarton, 20*th January*, 1922.—The Sheriff, having considered the cause, sustains the appeal; recalls the interlocutor of the Sheriff-Substitute of 23rd November, 1921, complained of; finds in fact and in law that the pursuer has failed to prove that the dwelling-house at 12 Stewart Street, Dalmuir, tenanted by the pursuer and belonging to the defender, is not in all respects reasonably fit for human habitation, or is otherwise not in a reasonable state of repair; therefore refuses the order prayed for, and decerns; finds the pursuer liable to the defender in his expenses, including the expenses of the appeal; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and to report; and remits the case to the Sheriff-Substitute. I. R. N. Macphail.

Note.—The question for decision is whether the pursuer has established that his house "is not in all respects" fit for human habitation, or is otherwise not in a "reasonable state of repair." That is a question of fact. The pursuer obtained a certificate, dated 15th July, 1920, from the sanitary inspector of the burgh of Clydebank, which stated that the granter had examined the house, and "find that it is not in 'all respects' fit for human habitation, or otherwise 'not in a reasonable state of repair' by reason of 'the following defects'" which are then specified. This "finding," as it purports to be, is a mere repetition of the words of the statute, and does not attempt to distinguish between the two categories which the Act has in view. But, apart from that somewhat serious fault, the certificate itself provides material enabling one to form an opinion as to the value of the finding. It is admitted in a letter from the sanitary inspector, dated 17th September, 1921, that certain of these defects have been remedied. Thereafter the letter proceeds to deal with the condition of the wall-paper, and concludes, "therefore that part of the certificate relating to the wall-paper must stand."

That is to say, in the opinion of the writer, a house is to be regarded as "not in all respects fit for human habitation, or otherwise not in a reasonable state of repair," because of certain defects in the wall-paper. I am quite unable to concur in such an opinion, even though it be the considered judgment of the sanitary inspector of the burgh of Clydebank. An elaborate proof has also been led, which must have cost many times over what it would have required to pay for repapering the whole house, and the Sheriff-Substitute has decided in favour of the pursuer.

I attach little value to any of the evidence, as the decision of the question in dispute seems to me to depend solely on what in fact is the condition of the house, and not in the least on what several people think about it. There are admittedly some unsightly patches on the wall-paper of the sitting room. These exist in other houses, and people sometimes have the sense to cover them with a picture or a piece of drapery. But in the present case it is gravely recorded as part of the pursuer's evidence. "The effect the patches have on me is that when I go into the room they take my eye every time. I cannot sit there at all now owing to the patches; I believe these marks upon the wall-paper really do affect my health. They make me quite nervous on coming into the room. I am a highly nervous man." Notwithstanding these sufferings, the pursuer does not propose to leave the house. So long as his rent is not increased, he is prepared to endure them and to permit his health to be affected.

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It is interesting to find that the sanitary inspector of the burgh of Clydebank, who also gave evidence, though he does not speak of his mental condition with the same engaging frankness, yet says—"The effect these patches would have on me is that it would be very irritating to sit in the room—it would get on my nerves, spoil my enjoyment as tenant."

There is no doubt in existence a body of legislation designed for the protection of "highly nervous persons" and others who allow things unduly to "get on their nerves," but the present Act is not of this character; it is a measure designed to regulate, in circumstances of some perplexity, the relations of normal people who happen to be the landlords and tenants of house property.

I quite understand that, if a man were taking a house, he might wish and stipulate for a new wall-paper, *e.g.*, one showing rosebuds instead of Chinese dragons—especially if he were "a highly nervous person"—but I cannot agree with the Sheriff-Substitute in the deduction which he draws from such a familiar fact and the test by which he has decided the present case. I. R. N. M.

Agent for pursuer and respondent—Mr. G. Muir, Dumbarton.
Agent for defender and appellant—Mr. T. M. Stewart (Messrs. Pirie & Stewart), Glasgow.

SHERIFF COURT OF LANARKSHIRE.

No. 10.
Lanarkshire
Clydesdale Bank, Ltd. *v* Reid's Trustees, &c.

The Clydesdale Bank, Limited, *Pursuers;* William Reid's Trustees and Another, *Defenders.*

Process—Multiplepoinding—Subject in medio *a sealed envelope deposited in a bank by a person now deceased—Claims by deceased's trustees and by the person to whom envelope addressed—Double distress—Competency.*—William Reid during his life deposited with his bankers a sealed envelope bearing this holograph endorsement—"This letter to be handed to Mr. William Reid, jr., 178 Campbell Avenue, Langside, after my death, if not claimed by me before that." This letter remained with the bank till Mr. Reid died, thereafter it was claimed by Mr. Reid's testamentary trustees and by Mr. Wm. Reid, jun. *Held* in an action of multiplepoinding at the instance of the bank, that the claim of William Reid, jun., should be preferred, and delivery to him of the envelope ordered; *observations* as to competency of action of multiplepoinding in above circumstances.

Succession — Will — Direction on cover of sealed envelope.—Held (1) that a sealed envelope, with an endorsement directing that after the writer's death it be handed to a certain person, was not a testamentary writing by the inscriber of the endorse-

ment, but formed a piece of property of which the person named was entitled to get delivery; (2) that in an action of multiplepoinding brought to determine the question of delivery, averments based on assumptions as to the contents of the sealed envelope were irrelevant.

The interlocutor by the Sheriff-Substitute (FYFE) was as under:—

Nov. 8, 1920
Sheriff FYFE

GLASGOW, 8*th November*, 1920.—Having considered the closed record and heard parties' procurators, finds (1) that on 1st November, 1915, the endorsed sealed envelope (No. 6/1 of process) was deposited at the Clydesdale Bank by the now deceased William Reid; (2) that it was not reclaimed by him from the bank; (3) that William Reid, senior, died on 29th April, 1920: Finds in law that the subject *in medio* being the property of the claimant, William Reid, junior, he is entitled to delivery of it; therefore sustains his claim, and authorises the Clerk of Court to deliver to him the subject *in medio*, being the sealed envelope (No. 6/1 of process); finds the claimants, William Reid's trustees, liable to the claimant, William Reid, junior, in expenses; allows an account to be given in, and remits to the Auditor for taxation. T. A. FYFE.

Note.—In this action of multiplepoinding the subject *in medio* is a sealed envelope (No. 6/1 of process) bearing this holograph endorsement by the deceased William Reid—"This letter to be handed Mr. William Reid, jr., 178 Camphill Avenue, Langside, after my death, if not claimed by me before that (signed, William Reid)."

The deceased William Reid left this sealed envelope at the Clydesdale Bank, and a bank official endorsed upon it this memorandum, "Received from Mr. William Reid, 1/11/15." The sealed envelope remained at the bank, not claimed by Mr. Reid, who had deposited it in the bank, from the time it was left at the bank on 1st November, 1915, till 29th April, 1920, when Mr. Reid, senior, died.

So soon as the bank had been certiorated that Mr. Reid, senior, had died, their obvious duty was to hand this sealed envelope to Mr. William Reid, junior, and this they would no doubt have done had nothing intervened. What did intervene was that the testamentary trustees of the deceased William Reid, senior, interposed, with the request that the sealed envelope should be delivered to them, and not to William Reid, junior.

It is, perhaps, doubtful whether this situation technically created double distress in the multiplepoinding process sense, and it is rather difficult to see what answer the bank could have had to a direct action against them by William

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Reid, junior, craving delivery of this sealed envelope. But the trustees of William Reid, senior, might also probably have raised an action for delivery of the sealed envelope. The process of multiplepoinding is not so narrowly regarded nowadays as it once was. It is a convenient process, and no plea is stated to the competency of this action.

It is very important to keep in mind, however, that the subject *in medio* is the sealed envelope only. The argument addressed to me for the testamentary trustees is based upon assumptions as to the contents of the sealed envelope, but with that in the present process I am not concerned. It may contain a blank sheet of paper, or something of sentimental value; or it may contain nothing at all; but what it may contain is not a factor at all in the present case.

This sealed envelope is not, in my view, a testamentary writing within the meaning of such cases as *Maclean*, 1891, 18 R. 874, or *Turnbull*, 1911, S.C. 1288. It is the property of William Reid, junior, and he is entitled to get delivery of it. The claimants, William Reid's trustees, may or may not have an interest afterwards to ask William Reid, junior, what the envelope contains. Upon that I offer no opinion. The averment in condescendence 3 of the trustees' claim is, in my opinion, irrelevant. Even if it were relevant, it does not alter the fact that William Reid did not, whilst in life, claim return to him of the envelope. William Reid, senior, was the conditional owner of this sealed envelope from 1st November, 1915. At 29th April, 1920, he became the absolute owner of it. Upon the admitted facts, this sealed envelope, at the date of the raising of this action, belonged to William Reid, junior; and I accordingly sustain his claim to get delivery of his own property. T. A. F.

The judgment was acquiesced in.

For real raisers—Mr. J. Neil Orr (Messrs. Robt. Walker & Orr), Glasgow.

For claimant—Mr. John Maxwell (Messrs. Maxwell, Hodgson, & Co.), Glasgow.

SHERIFF COURT OF PERTHSHIRE.

No. 11.
Perthshire
Macdonald, Fraser & Co., Ltd. *v* Foster, &c.

Macdonald, Fraser & Co., Limited, *Pursuers and Nominal Raisers;* Thomas Stanley Foster, *Defender and Real Raiser;* John Brown, *Defender.*

Multiplepoinding — Competency — Double distress — Price in auctioneers' hands—Claims by buyer and seller.—A dispute arose between the buyer and seller of a horse sold at an auction mart as to

whether the horse was conform to warranty. The auctioneers had at the sale received the price from the buyer and had retained it. They afterwards sold the horse "for whom it might concern." The buyer claimed repayment of the price, while the seller called upon the auctioneers to hand over the price to him. In an action of multiplepoinding brought by the seller as real raiser, *held* that there was no double distress, and the action dismissed; *opinion* that the true position was that the auctioneers were bound to account to the seller only, but the only claim the buyer had against them was through the seller.

The facts of this case were as follows:—On 6th September, 1920, the defender and real raiser Foster purchased in the auction mart of the pursuers and nominal raisers at Perth a brown horse belonging to the defender Brown, at the price of £24. One of the conditions of this sale (No. 3) was as follows:—

Lots shall be at the sole risk of the buyers on being knocked down or on a private sale being concluded, but the right of property shall not pass until the price is paid. All lots must be paid for in cash to the company when knocked down or when a private sale concluded, if then demanded; but these lots shall only be removable from the company's possession on a written order from their clerk. Any lots removed in contravention of these conditions may be recovered *brevi manu* by the company. The company shall have right to sue for the price of, and for the keep of or any other expenses incurred by them in connection with any lot, at their own instance, without the consent of the owner or consigner of the lot; and no defence whatever in such action shall be competent to the buyer who shall have recourse against the owner or consigner of the lot alone. The company shall be entitled in any case, if they choose, where a dispute has arisen concerning any lot, to retain the said price or lot until said dispute has been decided, and shall also be entitled to raise an action of multiplepoinding and exoneration in connection therewith. The company shall further be entitled to retain in their hands any stock and effects belonging to either a purchaser or seller till paid all sums that may be due to them by the owner, and shall be entitled to sell the same (after three days' notice by registered letter to the owner), and to recoup themselves from the proceeds, and to sue for and recover from the owner any balance remaining.

Foster made payment to the pursuers and took delivery. On 7th September Foster wrote the pursuers

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intimating rejection of the horse as disconform to warranty, and sought repayment of the price. The rejection was duly intimated to defender Brown, who denied breach of warranty, and claimed from the pursuers the price received by them. Ultimately pursuers sold the horse "for whom it might concern" at the price of £5 10s.

The real raiser in his condescendence stated that, in consequence of said competing claims made upon the price, the auctioneers were not in safety to pay the fund to either of said claimants without the authority of the Court, and pleaded that they be found liable only in once and single payment of the fund *in medio*.

The defender Brown pleaded that the action was incompetent, there being no double distress, and should be dismissed.

After hearing parties, the Sheriff-Substitute (Boswell) issued the following interlocutor and note:—

Feb. 22, 1921
Sheriff Boswell

Perth, 22*nd February*, 1921.—The Sheriff-Substitute, having resumed consideration of the cause, with the conditions (No. 4 of process and minute No. 5 of process), in respect there is no double distress, sustains the plea in law for the defender, John Brown, and dismisses the action; finds the defender, Thomas Stanley Foster, as real raiser liable to the said John Brown in expenses. C. P. Boswell.

Note.—This case cannot be distinguished from *Macdonald, Fraser & Co.* v. *Johnston*, 28 Sh.Ct.Rep. 204, a case not binding on me, but entitled to respectful consideration.

In the present case condition 3 provides that the buyer is to "have recourse against the owner or consigner of the lot alone." It seems to me that this excludes double distress. If the buyer must pay, he cannot sue for his money back after he has paid. Therefore there is no double distress.

I am unable to see that the immediately following words in condition 3 about a multiplepoinding can affect the matter. It may be said that when a dispute arises the intention then is that a trust on the part of the auctioneers for both parties is there and then to come into being, and that, in virtue of that trust, double distress is not needed. The words "trust" and "double distress" are never mentioned in condition 3. I think it meant what Sheriff Sym thought it meant, and I respectfully agree that meaning cannot be given effect to. C. P. B.

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April 2, 1921

Sheriff SANDEMAN

The defender Foster appealed to the Sheriff (SANDEMAN), who issued the following interlocutor and note:—

PERTH, *2nd April*, 1921.—The Sheriff, having heard parties' procurators, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute of 22nd February, 1921, complained of, and decerns; finds the defender Thomas Stanley Foster as real raiser liable to the said John Brown in his expenses of the appeal. CONDIE SANDEMAN.

Note.—Mr. Foster bought a horse which was exposed for sale by Mr. Brown through Messrs. Macdonald, Fraser & Co., Limited, as auctioneers. He paid the price to the auctioneers, who received the money as agents for Mr. Brown. Subsequently Mr. Foster rejected the horse as disconform to warranty, and wants to recover the price. In order to do so he has raised this multiplepoinding on the assumption that the money he paid to Messrs. Macdonald, Fraser & Co., Limited, is a fund to which there are competing claims. In my opinion the action is incompetent. As I understand it, the true position is that Messrs. Macdonald, Fraser & Co., Limited, are bound to account to Mr. Brown, but the only claim Mr. Foster has against them is through Mr. Brown. That is to say, there is really only one claim on the fund, if fund it be, because, strictly speaking, there is nothing but a liability on the part of Messrs. Macdonald, Fraser & Co., Limited, to account to Mr. Brown. C. S.

For Mr. Foster—Messrs. M'CASH & HUNTER, Perth.
For Mr. Brown—Messrs. DOUGLAS & BURT, Perth.

No. 12.

PERTHSHIRE

Stewart *v* Perth General Station Committee

JAMES STEWART, *Pursuer;* PERTH GENERAL STATION COMMITTEE, *Defenders.*

Process—Motion that common law claim of damages for personal injury proceed under Workmen's Compensation Act — When competent — Appeal against interlocutor granting such motion—Sheriff Courts Act, 1907, *sec.* 27.—*Held* (1) that an ordinary action for damages for personal injuries not maintainable at common law could be allowed to proceed as a claim under the Workmen's Compensation Act, 1906, when motion to that effect made after decree of absolvitor had been granted, but before Auditor's report on defenders' account of expenses approved of and extract issued; (2) that an interlocutor allowing such ordinary action to proceed as a claim under the Workmen's Compensation Act could not be appealed to the Sheriff without leave.

The pursuer sued defenders for £200 damages for personal injury sustained by him through the alleged

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negligence of the defenders while employed by them as a painter painting the roof of the General Station, Perth. On the 25th of April, 1921, the Sheriff-Substitute (Boswell) assoilzied the defenders from the crave of the initial writ. No appeal was marked against the interlocutor. On the 7th of June, 1921, the pursuer enrolled the cause to allow the case to proceed as a claim under the Workmen's Compensation Act. The defenders lodged their account of expenses and had it taxed. On the 17th day of June, 1921, the defenders moved for approval of their account of expenses. After hearing, the Sheriff-Substitute issued the following interlocutor and note:—

July 1 1921
Sheriff Boswell

Perth, 1*st July*, 1921.—The Sheriff-Substitute, having considered the cause, allows the same to proceed as a claim under the Workmen's Compensation Act, 1906; appoints the pursuer to lodge a minute stating the sum or sums so claimed by him within six days from this date, and assigns Monday, the 11th day of July, 1921, at 10 a.m. as a diet for hearing.

C. P. Boswell.

Note.—The cause was in every respect a pending process on 7th June when the motion was made. Appeal could have been taken against my interlocutor of 17th June (ten days later), and the Court appealed to could have been notified of the motion of 7th June. That distinguishes this case from *Baird* v. *Higginbotham & Co., Limited*, 1901, 3 F. 673, and *M'Gowan* v. *Smith*, 1907, S.C. 548.

C. P. B.

Without obtaining leave to appeal, the defenders marked an appeal against the foregoing interlocutor to the Sheriff (Sandeman). The pursuer maintained that the appeal was incompetent, in respect that if the case was an ordinary action leave to appeal should have been obtained, and if it was an appeal under the Workmen's Compensation Act it should have been by stated case.

After hearing parties' agents, the Sheriff issued the following interlocutor and note:—

August 13, 1921
Sheriff Sandeman

Perth, 13*th August*, 1921.—The Sheriff, having heard parties and considered the cause, finds that the interlocutor of the Sheriff-Substitute of 1st July, 1921, cannot, in terms of sec. 27 of the Sheriff Courts Act, 1907, be appealed without leave, and in respect that no leave to appeal was granted, dismisses the appeal; finds the expenses of the appeal to be expenses in the cause; and remits the cause to the Sheriff-Substitute to proceed. Condie Sandeman.

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Sheriff SANDEMAN

Note.—The pursuer sues the defenders for £200 as damages for personal injury sustained by him through the negligence of the defenders while engaged by them as a painter. The Sheriff-Substitute, by interlocutor dated 25th April, 1921, assoilzied the defenders with expenses, and on 17th June, 1921, approved of the Auditor's report on the defenders' account, and decerned. By interlocutor dated 1st July, 1921, the Sheriff-Substitute allowed the case "to proceed as a claim under the Workmen's Compensation Act, 1906." The defenders appeal against this interlocutor. The pursuer objects that the appeal is incompetent and refers to sec. 27 of the Sheriff Courts Act, 1907. In my opinion an appeal at this stage is incompetent without leave. It may well be that the interlocutor of the 1st July, 1921, is inept, because at the time he pronounced it the learned Sheriff-Substitute had finally parted with the case, and it may well be incompetent in so far as it purports to convert the action into an arbitration instead of following the directions of the Workmen's Compensation Act, sec. 1 (4). I desire to reserve my opinion on these questions. But in pronouncing the interlocutor the Sheriff-Substitute was purporting to act, not as an arbitrator under the Workmen's Compensation Act, 1906, but as "the Court in which the action is tried" (sec. 1 (6)), and so far as I am concerned I must apply to the interlocutor the usual test of sec. 27 of the Sheriff Courts Act. I shall accordingly refuse the appeal. C. S.

For pursuer—Messrs. R. MACGREGOR MITCHELL & Co., Perth.
For defenders—Messrs. JAMESON & MACKAY, Perth.

SHERIFF COURT OF LANARKSHIRE.

No. 13.
LANARKSHIRE
M'Rae & Haldane *v* Lindsay

M'RAE & HALDANE, *Pursuers;* DR. ALEXANDER LINDSAY, *Defender.*

Reparation—Negligence—Collision—Main road and side road traffic—Counter claim—Credibility of witnesses.—Pursuers sued defender for loss and damage sustained by them arising out of a collision between their respective motor cars, which occurred at the intersection of a main road (on which pursuers' car was being driven) and a side road (on which defender's car was being driven), and averring negligence on defender's part. Defender counter claimed, averring negligence on pursuers' part. *Held* pursuers solely at fault, and defender entitled to damages as counter claimed.

The facts of this case are fully explained in the

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May 4, 1921
Sheriff Lyell

following interlocutor and note of the Sheriff-Substitute (Lyell):—

Glasgow, *4th May*, 1921.—Having considered the proof and process finds in fact (1) that on the 10th of February, 1920, a collision occurred between a motor car, the property of the pursuers, then being driven southwards by Mr. M'Rae, of the pursuers' firm, on the main road leading from Glasgow to Lesmahagow, and a motor car, the property of the defender, then being driven by the witness Dr. Millar westward on the road leading from Auchenheath to Kirkmuirhill at the point of intersection of the said two roads; (2) that the said collision was brought about by the fault of the said driver of the pursuers' motor car; (3) that it was not brought about or contributed to by any fault on the part of the driver of the defender's motor car; (4) that both motor cars received damage as the result of the collision: Finds in law (*a*) that the defender is not liable in damages (*b*) that the pursuers are so liable; assesses the damages at £162 10s.; therefore assoilzies the defender from the conclusions of the action; sustains the counter claim and decerns against the pursuers for payment to the defender of the said sum of £162 10s., with interest, as craved; finds the defender entitled to expenses; allows an account thereof to be given in; and remits the same to the auditor to tax and report.

Will. Darling Lyell.

Note.—This is an action and a counter claim in which each party claims damages from the other in consequence of a collision between two motor cars, the property of the respective parties.

The circumstances are these. On 10th February, 1920, Mr. M'Rae, of the pursuers' firm, was driving a Buick motor car southwards on the main road from Glasgow to Lesmahagow. About the same time, Dr. Millar, the assistant of the defender, Dr. Lindsay, was driving a Ford motor car westward up the Auchenheath road, which joins the Glasgow and Lesmahagow road on the east side of it. This Auchenheath road is continued westward for some distance on the west side of the main road, the defender's house and garage standing to the north of this continued road, in the angle formed by it and the main road. Dr. Millar's objective was the garage gate of the defender's house, and in order to reach it, he had to cross the main road from east to west. As he was in the act of so doing, the collision occurred somewhere on the crossing between the pursuers' car, then being driven southward on the main road, and the defender's car, then being driven across the main road from east to west.

As I have said, each party blames the other. The question is one purely of fact—the correct inference to be drawn from conflicting evidence—but it is none the less difficult, because the evidence is not only conflicting, but irreconcilable on many points. I regret to say that there is no room for the explanation of innocent mistake in a good many instances. One or other sets of the witnesses must be deliberately stating something that is not true.

First, as to the Ford car. I may say at once that I accept as substantially correct the evidence of Dr. Millar, both as regards his own speed at the time, and the part of the crossing at which the collision took place. Further, I am of opinion that it is conclusively established that it was the Buick car that struck the Ford, end on, that is to say, that the front of the Buick car charged into the off side of the Ford, and pushed and carried it broadside on across into the ditch and against the bank on the south-west corner of the crossing. I am not disposed to pay much regard to the confusing and contradictory evidence about wheel tracks on these much frequented roads on a sleety, slushy day in February, but the evidence of the place where the Ford was lying after the accident, and of the kind of damage done to both vehicles, goes far to establish the truth of the story told by Dr. Millar, who was, of course, there at the time, and of the defender, who was on the spot immediately after. They say that the Ford was found lying with its near side against the bank of the south-west corner, its forepart pointing towards the west, the direction in which the Ford had been going when it was struck, and the front dumb iron, the front projecting springs, and the nose of the bonnet of the Buick, were embedded in the off side of the Ford. The damage done to the Ford was consistent with what Dr. Millar says occurred. The off wheels and running board were smashed, the rear wheel on the near side was also smashed where it had been driven into the bank, and there was what the witness Park calls "a big bash," in under the driver's seat on the off side of the car, which appeared as if it had received a severe impact, "because it was an inward bend." Now, the damage to the Buick, in spite of what the witnesses for the pursuers may say, was precisely what one would expect from a collision occurring in the manner alleged by Dr. Millar. It is detailed by Mr. Campbell, a gentleman of great skill and experience, and it establishes that the bonnet was buckled. The starting handle in front was buckled, and the whole radiator driven right back so as to break the fan. All this corroborates the story of Dr. Millar and contradicts that of the pursuers as to the

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manner of the collision. And, further, it has a material effect, as a test of the credibility of certain of the witnesses, as I shall show later on.

But the pursuers are quite entitled to say, and do say, that, even granted that this version of the accident be accepted, and that the front of the Buick struck the off side of the Ford while the Ford was crossing the main road, Dr. Millar may still be in fault. Once more, we have the question of the relative degrees of caution required by the users of a main road and a side road at a junction respectively. Dr. Millar's evidence is perfectly frank on the subject. He says that as he emerged from the side road, going at the rate of seven or eight miles an hour, he turned his eye to the right and saw the pursuer approaching from the north, "going faster than the average person." The pursuer was then 210 feet or 70 yards off, and on the wrong side of the road. Nevertheless, thinking that he had time to cross, Dr. Millar went on, with the result that the pursuer crashed into him. The pursuers maintain that, on the plain statement of it, it was the obvious duty of Dr. Millar to give way, and that his failure to do so constitutes negligence, which not only prevents the defender from recovering under his counter claim, but which entitles the pursuers to damages for the injuries done to their car. Now, I cannot help thinking that many drivers on main roads—and indeed there were indications of the fallacious belief, in the evidence in this case—have recently formed an entirely erroneous opinion as to their rights and duties when so driving. It is quite true that it is the primary duty of vehicles approaching from a side road to give way to those on a main road where there is danger of a collision, but that does not mean that drivers on main roads may go straight ahead and leave those so emerging to look out for themselves, or take the consequences. It is also the duty of those on a main road to approach a crossing with caution, and a vehicle crossing a main road is entitled to rely on such drivers exercising that caution. That seems to me to be the result of the well-known recent cases, particularly *Robertson* v *Wilson*, 1912, S.C. 1276, and the judgment of Lord Kinnear at p. 1279. Here, Dr. Millar says that he formed the opinion that he had plenty of time to cross at the rate at which he was going, if the pursuer did his duty by slowing down and steering round behind the Ford on the east side of the main road going southwards. According to the evidence, Dr. Millar was right. There was no reason why, if the pursuer had had his car under proper control, he should not have performed that manœuvre quite

successfully. The cars came in sight of each other when they were 210 feet, or 70 yards, apart. By the time the Ford arrived at the point, which I hold to be the point of collision, it had travelled some 16 yards. At eight miles an hour it would cover that distance in four seconds; and as the Buick car covered 70 yards in that four seconds it must have been travelling at the average of thirty-five miles per hour. I am of opinion that Dr. Millar was guilty neither of fault nor even of error of judgment in going on, and that he was entitled to rely on the pursuer exercising that care and caution which he was bound to exercise.

It follows from what I have said that I consider the pursuer Mr. M'Rae to have been in fault. His credibility on all points is much shaken by the disproof of his account of the manner of the collision. No one saw it, as I have said, except the occupants of the two cars, but that immediately afterwards the cars were found in the position I have explained, with the nose of the Buick sticking into the off side of the Ford against the bank at the south-west corner of the crossing, I have no doubt. The defender says so. Dr. Millar says so; and there was no one else there except the pursuer. Dr. Lindsay says, and in this he is corroborated by Dr. Millar, that the pursuer and he together actually disentangled the two vehicles, and pushed back the Buick from the Ford. Doubt was sought to be cast upon Dr. Lindsay's statement, and in cross-examination he was asked whether he had told this story before, to which he replied that he had no doubt he had because it was true. Now, we have a rule, the exact reason for which I have never understood, that although you may contradict a witness by asking and proving that he had previously made a different statement from the story told by him in the box, you cannot corroborate him by proving that all along he had consistently told the same story, unless, of course, the story be part of the *res gestæ*. Once a man is asked in cross, however, whether he has ever before told the same story, it is permissible for him to answer, and for his agent to jog his memory on the subject in re-examination. It turns out that, in his report and letter to his insurance company, Dr. Lindsay *de recenti* told the story consistent in every detail with the story he now tells.

It therefore appears to me that Dr. Lindsay, the defender, and Dr. Millar are witnesses of credit. The accident was brought about by the pursuers approaching this crossing recklessly, and failing to take proper precautions when, in the exercise of permissible discretion, Dr. Millar proceeded to cross. Indeed, the pursuer him-

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self admits that it would have been reckless for him to approach this corner at twenty miles an hour, and, in my opinion, he is proved to have been guilty of much greater negligence than that.

I prefer to make no comment on the evidence of Moffat, the bicyclist, and others of the pursuers' witnesses. They were certainly not on the scene when the accident occurred, or, according to perfectly reliable evidence, until a considerable number of minutes had elapsed.

I shall therefore assoilzie the defender from the conclusion of the action and decern in his favour for the amount of the counter claim, there being no question, as I understand, on the subject of the amount so claimed. The counter claim should, of course, have been set forth in a separate statement of facts, but the pursuers waived all objection under this head. W. D. L.

For pursuers—Mr. J. B. Paton, advocate, instructed by Messrs. J. & J. Gartshore Scott, Glasgow.

For defender—Mr. J. Turner MacFarlane (Messrs. Manson & Turner MacFarlane), Glasgow.

No. 14.
Lanarkshire
Stuart-Brown v Caledonian Railway Co.

Mrs. Janet Stuart-Brown, *Pursuer;* The Caledonian Railway Company, *Defenders.*

Carriage—Railway company—Passengers' luggage—Contributory negligence.—Held (1) that where personal luggage is taken with a passenger by rail into the compartment, the liability of the railway company is that of common carriers; (2) it is immaterial that the article was placed in the carriage by the passenger instead of by an employee of the company; (3) the fact that the article in question was placed under the seat of the carriage is not *per se* contributory negligence so as to exclude a claim for damages; (4) that the defenders were liable for damage sustained by the pursuer's suitcase through its having come in contact with a hot pipe placed underneath the carriage seat. *Observed* that apart from their liability as common carriers the defenders were liable on the ground of negligence.

The circumstances giving rise to this Small Debt action of damages sufficiently appear from the following two interlocutors issued by the Sheriff-Substitute (Lyell) after debate and proof respectively:—

April 4, 1921
Sheriff Lyell

Glasgow, *4th April,* 1921.—I do not see how I can decide this case without inquiry, the averments in the claim being in my opinion relevant to go to probation. The pursuer says that on 5th November, 1920, she travelled from Glasgow to London by the night train. In the third class carriage in which she travelled she had with her an article of

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personal luggage, to wit a suitcase. If it really was personal luggage, it appears to me to be immaterial whether the pursuer carried it to the carriage herself or engaged a porter to do so. Once it got there, and the pursuer got in beside it, the defenders became common carriers of it, just as if it had been placed in the van by one of their servants, subject to this modification, that in respect of the pursuer's personal control of the suitcase in the carriage, the defenders are not liable for any injury during its transit to which the act or default of the pursuer was contributory. (That sentence is merely an adaptation of the words of Lord Watson in the case of *Bunch* v. *G. W. Rail. Co.*, 1888, 13 A.C., p. 48.)

Now the complaint of the pursuer is that, during the transit, the suitcase was burned and destroyed by being in contact with a hot pipe under one of the seats where she had placed it. The answer of the defenders is that, if she chose to put her suitcase there without satisfying herself as to the safety and suitability of the place, *sibi imputet.* On the other hand the pursuer maintains, in the words of Lord Lindley, then Mr. Justice Lindley, in *Hyman* v. *Nye*, 1881, 6 Q.B.D., p. 687, that a railway company, like a man who lets out carriages, though not an insurer against all defects, is an insurer against all defects which care and skill can guard against. The fact that suitcases are frequently shoved under seats is common knowledge, and therefore, the pursuer says, it was the duty of the defenders to give one warning of the existence of any latent danger.

It appears to me that no decision can be arrived at until the true facts are ascertained. I shall therefore put the case out for proof.

A proof having taken place, the Sheriff-Substitute granted decree for the amount sued for, adding to his interlocutor the following note:—

May 16, 1921

Sheriff LYELL

GLASGOW, 16*th May*, 1921.—It being now admitted—as, indeed, it could not very well be denied—that the law laid down by the House of Lords in the case of *Bunch* v. *G. W. Rail. Co.*, 13 A.C. 31, is in terms applicable to this case, there remains for decision a simple question of fact. The defenders had the responsibility of common carriers for the suitcase in question and the articles of personal luggage therein contained, even although it was carried in the compartment with the pursuer, subject to this, that they were not liable for any injury to it or its contents during transit to which the act or default of the pursuer was contributory.

The question of fact, therefore, is this—Was it an act of negligence on the part of the pursuer to place her suit-

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case under the seat of the compartment, where it came in contact with the steam-heated pipe that did the damage? If she knew, or had reason to know, that there was danger of injury to the article by placing it where she did, doubtless her act was negligent. That there was danger is obvious, *res ipsa loquitur*. On the other hand, members of the travelling public are not instructed that the steam is admitted into these pipes under such pressure as to raise their temperature fifty or sixty degrees above boiling point. Indeed it was news to the railway official examined that steam under the pressure admitted generated such a degree of heat. It comes to this, then, that the defenders had, concealed under the seat, a dangerous and destructive instrument, bound to damage ordinary articles of luggage brought in contact with it, without notice or warning to those who were entitled to bring such articles into the carriage.

It is urged, with some force, that luggage should not be put under seats at all, or, in any event, that the passenger is bound to certiorate himself that the recess below the seat is a safe place. That might be so if there was any intimation that the company refused to carry or be responsible for luggage put under seats. That is not so. On the contrary it is matter of notoriety that suitcases are frequently stowed there, not only by passengers, but by railway servants. I am quite satisfied in this case (1) that the pursuer had no idea that there was danger in placing the suitcase where she did; (2) that her action in so doing, in a carriage where the racks were full and the compartment crowded, five on each side, was natural and excusable; (3) that no warning or notice of danger was given.

I have only to add that, in my opinion, to place, without warning, a pipe so overheated as to be liable to burn any article coming in direct contact with it, in the position in which this pipe was, was in itself an act of negligence on the part of the company, and I should have been inclined to hold them responsible, even had their liability not been that of common carriers but only the ordinary duty to take care. I shall grant decree as craved.

Will. Darling Lyell.

Bunch v *Great Western Railway Company*, 13 L.R., A.C., p. 31; *Richards* v *London & South Coast Railway*, 18 L.J. (C.P.), p. 251; *Tally* v *Great Western Railway Company*, 1870, 6 L.R. (C.P.), p. 44; *Hyman* v *Nye*, 1881, 6 Q.B.D., p. 687.

For pursuer—Mr. Wm. Beckett, Jun. (Messrs. Brownlie, Watson, & Beckett), Glasgow.

For defenders—Mr. D. L. Forgan, Glasgow.

SHERIFF COURT OF ORKNEY & SHETLAND.

No. 15.
ORKNEY AND SHETLAND
Muir v Alexander

THOMAS MUIR, *Pursuer;* WILLIAM ALEXANDER, *Defender.*

Reparation—Master and servant—Harbouring by employer of servant in breach of his contract of service—Knowledge of desertion—Dismissal and subsequent re-engagement.—A farmer who had engaged a deserting servant, dismissed him on being informed that he was under contract elsewhere, but subsequently re-engaged the same servant and continued to employ him after intimation that he was still under contract to his first employer. Action for knowingly harbouring a deserting servant *held* relevant (*Rose Street Foundry Company* v. *Lewis & Sons*, 1917, S.C. 341, applied), and, after proof, reparation awarded.

Thomas Muir, farmer, Backaskaill, Sanday, brought a Small Debt action in the Orkney Sheriff Court at Kirkwall against William Alexander, farmer, Howe, Sanday, concluding for payment of £20 for loss sustained by him for which he averred defender was responsible, in respect that defender engaged a farm servant who was under contract to serve pursuer, and knowingly harboured him, and continued to employ and harbour him after notice from pursuer that he was a deserting servant of pursuer's. The relevancy of the action was contested, and the Sheriff-Substitute (MARTIN LAING) allowed proof before answer. Proof was led and the case debated. The Sheriff issued a judgment as follows:—

August 2, 1921
Sheriff LAING

This is a Small Debt action by one farmer against another for harbouring a servant while still under contract, after intimation of the existence of the contract. At the discussion on the preliminary pleas the defender maintained (1) that until pursuer established a contract of service between himself and the servant, Tulloch, he was not entitled to sue the defender, and (2) that he could only sue the defender conjointly and severally with the servant, Tulloch. A proof before answer was allowed. At the proof the agent for the defender admitted that on 16th April, 1921, a contract of service for the half-year from Whitsunday to Martinmas, 1921, was entered into between the pursuer and Tulloch, and later, as it seems to me, somewhat shifted his position to this, that, although a contract had been entered into, yet the pursuer had put an end to that contract, and the servant being free to contract with any other, the defender had committed no wrongous action in employing him.

Let me deal with the second contention first. On the authority of *Belmont Laundry* v. *Aberdeen Laundry*, 1898, 1 F. 45, it is clear that a joint and several conclusion for damages against the servant and the defender would have been competent although the ground of action against each would be different—that against the servant Tulloch being for breach of contract, and that against the defender for a wrongous and illegal act, the damages suffered being the consequences of the servant leaving the pursuer's service while still under contract. But while that is so, it does not follow that the pursuer is bound to sue both, and that an action against the employing defender is incompetent. There are many examples in decisions of the employing defender alone being sued. Indeed, Glegg on Reparation, p. 297, suggests that the suing of the servant jointly and severally with the defender is an anomaly of justice founded apparently on the idea that there has been joint action prejudicial to the pursuer, and that the action against the one may be for breach of contract and against the other for deceit.

The pursuer, in my opinion, clearly proved a re-engagement of the servant Tulloch, on 16th April, 1921, for the ensuing half-year, from Whitsunday to Martinmas, 1921, and, indeed, the agent for the defender admitted that. On the evening of the day (Thursday, 28th April) in which this contract was concluded Tulloch went home without assigning any cause, and did not return to his employment. The explanation given by Tulloch for this is that he was that day injured while at the plough, but apart from the fact that that was entirely uncorroborated, and that no foundation was laid for it in the record, this, which, if proved, might have been quite a good excuse for his absence from work, was not put to the pursuer in cross-examination. No notice or intimation of the injury or illness was sent by him to his employer. The pursuer wrote Tulloch on 4th May a letter which is not altogether a creditable performance, and, in my opinion, made it more unpleasant for the absenting employee to return to his service. It, however, reminded Tulloch of his engagement, and warned him of the result of continued breach. No answer was sent; neither was there then any intimation of illness or injury or inability to return given by Tulloch. In answer to a further communication from pursuer's law agents, calling on him to return to his service, Tulloch wrote on 13th May, noting the pursuer's "offer of employment again," but merely stating that "so far Mr. Muir had not stated any reason why I have deserted him." Thus the desertion that was begun by Tulloch on 28th April continued in

spite of repeated requests by pursuer to return to his work and warning of consequences. An attempt was made by Tulloch to prove that on 9th May he had offered to return to work, but that pursuer had cancelled the contract by telling him it was too late, and that the matter was in the hands of the law. The pursuer denied this, and I regret I cannot accept it, for several reasons. But, at any rate, if such had taken place, why should Tulloch not offer that as an answer when he writes four days later, on 13th May, in answer to the letter from the pursuer's law agent. He was being called on to return to his employment in accordance with his contract, and that he was refused permission by the pursuer would have been a good answer. But, according to Tulloch's own story, he went back on 18th May, offering to return to work, and was told to go ahead; his work was there. But he himself then raised the question of his being paid the minimum wage. This was at a point of time when he was still bound under his previous six months' contract, of which there were still ten days to run, when his contract for the next six months would then come into force. Tulloch's attitude was a refusal of service to enable him to innovate on not only the terms of the contract he had entered on for the six months to Martinmas, 1921, but also those of the then current contract for the half-year to Whitsunday, 1921. I have no hesitation in holding that there was a contract of service from Martinmas, 1920, to Whitsunday, 1921, and one from Whitsunday to Martinmas, 1921, binding the pursuer and Tulloch, and that Tulloch unwarrantably breached both.

Immediately after 28th May the defender employed Tulloch, but as soon as he was informed that Tulloch was under a contract of service to pursuer he dismissed him. At the time he engaged Tulloch he presumably understood Tulloch was free to contract with him, and after he dismissed Tulloch, had he done nothing more, there would have been an end of the matter. But on 8th July the defender re-employed Tulloch, and continued to do so after intimation from the pursuer that Tulloch was under contract with the pursuer till Martinmas, 1921. It is, in my opinion, and on the authority of *Rose Street Foundry Company*, 1917, S.C. 341, which is binding on me, a clear case of knowingly harbouring a servant in breach of his contract of service. In regard to the loss alleged by the pursuer to have been sustained as a result of the wrongous act of defender, that is a more difficult matter to deal with. The pursuer assessed the various items of loss at a total of £41 18s., but had modified these to £20. The defender did

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not cross on these, but I cannot allow the full amount claimed. There is undoubtedly much loss, inconvenience, and disorganisation caused by a deserting servant, but I cannot hold that the death of all eight lambs can be attributed to the action of the defender, or even of the combined action of him and Tulloch, nor can I accept that, had the servant implemented his contract, the sheep would never have done damage. Losses and accidents such as these occur in spite of the best organisation and attention. But there can be no doubt that pursuer has suffered a certain amount of loss. He will also have to pay his present staff for overtime. The saving in not having to pay wages and keep of Tulloch must be set against the loss resulting from the lost services of a first horseman. I think I, as nearly as may be, accurately value the net loss at about £10. I therefore grant decree for £10, with £5 2s. 6d. of expenses.

For pursuer—Mr. J. C. Morrice, Kirkwall.
For defender—Mr. F. Buchanan, Kirkwall.

SHERIFF COURT OF STIRLINGSHIRE.

No. 16.
Stirlingshire
Prison Commissioners for Scotland v Donaldson

The Prison Commissioners for Scotland, *Pursuers;* John Donaldson, *Defender.*

Landlord and tenant—Summary ejection—Increase of Rent, &c., Act, 1920—*Alternative accommodation—Statutory corporation—Crown prerogative—Crown property—Crown's exemption from public statute.*—Circumstances in which *held* that pursuers were not entitled to plead that they represented the Crown, they being a statutory body having no rights apart from the statute constituting them, and an action of summary ejection at their instance dismissed as irrelevant in respect of pursuers' failure to aver that alternative accommodation available to tenant. *Opinion* that the statute above referred to applied to Crown property held as revenue-producing subjects.

The facts of this case are fully set forth in the following interlocutors and notes:—

July 15, 1921
Sheriff Robertson

Falkirk, 15*th July*, 1921.—The Sheriff-Substitute, having advised the cause, finds that the pursuers' averments are irrelevant and insufficient to support the prayer of the initial writ; therefore dismisses the action; finds the pursuers liable to the defender in the expenses; allows an account thereof to be given in and remits the same when lodged to the Auditor of Court to tax and to report.

J. A. T. Robertson.

Note.—The pursuers, the Prison Commissioners for Scotland, who, as I am informed, became proprietors of the house mentioned in the initial writ, by purchase at

Whitsunday, 1920, crave warrant for summary ejection from it of the defender, who has been tenant for some years. They duly served upon him a notice to quit on 28th March, 1921.

The defender pleads that the averments are irrelevant in respect that by sec. 4 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the Court is debarred from pronouncing an order for ejection of a tenant unless one or more of certain conditions therein set forth, none of which is averred here, are alleged and proved.

In reply to this contention Mr. Fraser conceded that it would be sound in the case of an ordinary pursuer, but he maintained that the present action is at the instance of the Crown and that the Crown is not bound by the terms of any Act of Parliament, unless it is specially provided by the Act itself that it shall be so bound. There is no such provision in the Increase of Rent, &c., Act.

This argument might raise a number of very interesting questions, if in law the pursuers represent the Crown and are entitled to found upon the Crown's prerogative at all. I cannot hold that they are.

The Prison Commissioners for Scotland are a body corporate, of purely statutory origin. By sec. 7 of The Prisons (Scotland) Act, 1877, it is provided that a certain number of persons may be appointed by His Majesty to act along with the Sheriff of Perth and the Crown agent for Scotland as commissioners "for the purpose of aiding the Secretary of State in carrying into effect the provisions of this Act relating to prisons in Scotland." The powers and duties of the commissioners are laid down by the statute. No authority was cited to me, and I know of none, for holding that a body which owes its existence and the definition of its powers and duties, not to the Royal will, but to the decrees of Parliament, is entitled to claim immunity from the ordinary effects of legislation on the ground that it represents the Sovereign.

In the absence of such authority I conceive that I am bound to hold that the present pursuers hold the house, which is in question in this case, subject to the provisions of the Increase of Rent, &c., Act, 1920, and require for a relevant claim for a warrant of ejection to aver some ground which, under that Act, would justify the Court in making the order.

I accordingly dismiss the action. J. A. T. R.

The pursuers appealed to the Sheriff (MACPHAIL), who, after hearing parties, pronounced the following interlocutor and note:—

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Nov. 10, 1921
Sheriff Macphail

Falkirk, 10*th November*, 1921.—The Sheriff refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute of 15th July, 1921, complained of and decerns; finds the pursuers liable to the defender in his expenses of the appeal and remits to the Sheriff-Substitute.

J. R. N. Macphail.

Note.—I agree with the judgment of the Sheriff-Substitute. In the initial writ the pursuers design themselves as The Prison Commissioners for Scotland, and aver that they are the proprietors of a dwelling-house, of which the defender was their tenant from Whitsunday, 1920, at a rent of £14 to Whitsunday, 1921, and they crave his ejection therefrom.

There are no written defences, but it appears from the Sheriff-Substitute's note that the defender pleaded that he was protected by the Increase of Rent and Mortgage (Restrictions) Act, 1920, and that the pursuers replied that this Act was not binding on them on the ground that it does not apply to the Crown, in respect that the Crown is not expressly mentioned therein, and that they are entitled to plead its prerogative.

There is nothing in the initial writ which discloses either the ground on which the pursuers claim exemption from the provisions of this Act, of which they must be presumed to have been aware, or how they come to be possessed of the dwelling-house in question, and they have not produced their title thereto. The Sheriff-Substitute, however, was informed (1) that their claim is based on the Act, 40 and 41 Vict. cap. 53; and (2) that this dwelling-house was purchased by them at Whitsunday, 1920. It is therefore plainly not part of the proper patrimony of the Crown.

At the hearing of the appeal these statements were not challenged and various cases were cited by the procurator for the pursuers as well as the statute to which I have referred. In addition to what is quoted by the Sheriff-Substitute, sec. 7 of this Act also contains this provision—"The commissioners shall be a body corporate with power to hold land so far as may be necessary for the purposes of this Act, and shall be styled The Prison Commissioners for Scotland." There is nothing else in the Act which bears on the present question.

Such of the cases cited as refer to the exemption of the Crown itself from local and Imperial taxation do not, it is plain, apply to the present case. Nor do cases where (*e.g.*, *Coomber* v. *Justices of Berkshire*, 1883, 9 A.C. 61) the subject in respect of which exemption was sought was not only owned but also occupied by or on behalf of the

Crown. This clearly appears from the judgment of Lord President Dunedin in the *Glasgow Court-house* case, 1913, S.C. 194, at p. 203, where his lordship differentiates between subjects so occupied and subjects let for rent to another occupier (see also *Midlothian County Council*, 1915, S.C. 776). The pursuers were unable to cite any case which decided that under no circumstances can the Crown be bound by a statute passed since 1707 unless the Crown is expressly mentioned therein. Indeed a contrary view was indicated by Lord President Dunedin in *Mags. of Edinburgh* v. *Lord Advocate*, 1912, S.C. 1084, at p. 1092. In England whence the doctrine was imported into Scotland there is similar authority. In *Hornsey Urban Council*, 1902, 2 K.B. 73, at p. 80, Lord Alverstone, C. J., delivering the judgment of the Court, said "We are far from saying that there may not be provisions in public Acts of Parliament so framed as to bind the Crown even though the Crown may not be specially named. But in our opinion the intention that the Crown shall be bound or has agreed to be bound must clearly appear either from the language used or from the nature of the enactments." And again in *Cooper* v. *Hawkins*, 1904, 2 K.B. 164, the same eminent judge said, p. 170—"I do not overlook that to which I ventured to refer in the Hornsey case that there may be general provisions of a public character which may bind the Crown." It must be kept in view that the Increase of Rent Restrictions Acts are not so much Acts imposing obligations on any one as Acts which, with the consent of the Crown, conferred rights on the tenants of certain subjects irrespective of who the owner might be. And if it were necessary to decide the question I should be prepared to hold that all these Acts passed in circumstances and for a purpose which are matters of public notoriety—applied to the Crown itself, in any case where it was the landlord of any tenant to whom the Acts applied. And so far as the Act of 1920 is concerned I rather think this view is emphasised by the terms of sec. 12 (10). But it is sufficient to hold that the Act of 1920 applies to the pursuers so far as the present case is concerned.

In the first place they are not the Crown, but a statutory corporation entitled to hold land so far as may be necessary for the purposes of their Act among which letting to tenants does not appear to be included. Secondly, the house in question is not in fact being occupied or used for any Crown purpose, but as a revenue-producing subject. Thirdly, the house was only acquired by the pursuers at Whitsunday, 1920, when the tenants of such houses, including actually the defender, already had the rights which in 1920 were prolonged for a further period.

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The validity of a legal proposition is not affected by the results which it may entail. But it is instructive to notice that if the claim of the pursuers were well founded it would mean that they can at their convenience invoke the general law of landlord and tenant, and at the same time repudiate what Parliament has made a part of that law. It would also mean that with regard to this house which they bought in 1920, the pursuers are not bound by such statutes as, *e.g.*, the Removal Terms (Scotland) Act, 1886, and the Feudal Casualties (Scotland) Act, 1914, or even by the provisions with regard to notice contained in the Sheriff Court Acts under which this action is brought.

J. R. N. M.

For pursuers—Messrs. James Wilson & Sons, Falkirk.
For defender—Mr. Hugh P. Black, Falkirk.

SHERIFF COURT OF RENFREW & BUTE.

No. 17.
Renfrew and Bute
Aitken *v* Morris

Mrs. Jeanie Aitken, *Pursuer;* Myles Morris, *Defender.*

Landlord and tenant—Furnished dwelling-house—Removing—Summary ejection—Notice—Sheriff Courts Acts, 1907 *and* 1913, *sec.* 38, *rules* 113, 115, *forms* J *and* K.—*Held* that written notice in statutory form is an essential preliminary to an action of summary removing and ejectment under sec. 38 against the tenant of a furnished house let for a period of less than a year, and, no valid notice having been given, action *dismissed* (*Campbell's Trustees* v. *O'Neill*, 1911, S.C. 188, applied).

This was an action of summary removing under sec. 38, and in Form K of the First Schedule to the Sheriff Courts Acts, 1907 and 1913. The pursuer claimed decree of removing and warrant to eject the defender from a furnished dwelling-house at Gourock, which was let by pursuer to defender for eight months from 4th October, 1920. The pursuer did not found on any written or formal notice to remove, but she averred that on 1st February, 1921, she gave notice orally to the defender's wife requiring the defender to remove at the termination of the tenancy on 31st May, 1921. The pursuer also alleged that the house was let to defender on the understanding and intention of the parties that the defender's tenancy would terminate on 31st May, 1921. In the course of his defence the defender pleaded that the action was incompetent on the ground, mainly, of no formal notice to

remove. The Sheriff-Substitute (MERCER) gave effect to that plea, and dismissed the action in accordance with the following note:—

Nov. 4, 1921
Sheriff MERCER

GREENOCK, *4th November*, 1921.—This action craves a warrant of summary ejection of the tenant of a furnished dwelling-house let for a period of eight months. It is brought in the terms of form K in the first schedule of the Sheriff Courts Act of 1907, by virtue of the provisions of sec. 38 and rule 115 of that Act. The defender challenges the competency of the action in respect that no notice of removal was given by the pursuer to the defender in writing. The pursuer maintains that as the let was specifically for eight months and no longer, notice of removal was unnecessary, and that, in any event, verbal notice was timeously given, which is sufficient at common law, and is all that is required by the statute. The first of pursuer's contentions is, I think, clearly not maintainable, because she is using the new and simplified procedure instituted by sec. 38, which expressly stipulates for notice of some kind, and it is well settled as, for example, in *Campbell's Trustees* v. *O'Neill*, 1911, S.C. 188, that the person who resorts to a simplified statutory procedure must follow it exactly if he is to take benefit from it. The ground of pursuer's second contention is that sec. 38 does not prescribe that the notice it requires must be in writing, and that the only rule (113) which refers to the notice required by sec. 38, and prescribes methods of giving it which could only apply to a written notice, is permissive and not imperative, and that therefore he is entitled to fall back upon the common law notice, which admittedly may be verbal. Now, it is a significant comment on this contention that the present process, which craves *simpliciter* a warrant for summary ejection, could not at common law be employed against a tenant; while the only persons against whom it could be so employed, viz., persons whose title to occupy had already been completely cut down, *e.g.*, employees whose employment had been terminated, and persons who never had a title to possess, *i.e.*, squatters, are not entitled at common law to notice at all. But the question must be settled by reference to the terms of the statute, and their construction, it must be admitted, is not simple.

The *fasciculus* of sections dealing with removals falls into two parts. Secs. 34, 35, and 36 deal with lands exceeding 2 acres in extent, while secs. 37 and 38 deal with houses and all other heritable subjects excepting lands exceeding 2 acres in extent. It is true that that exception is not express in sec. 38, probably because lands exceeding 2 acres in extent let for less than twelve months are, if not non-

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existent, a negligible quantity. Sec. 37 deals with houses, &c., let for a year or more. Sec. 38 deals with those let for less than a year.

Now, sec. 37 consists of three separate heads. The first provides that notice of termination of tenancy shall be given in writing by the party desiring to terminate it to the other party. The second provides that such notice, unlike that dealt with in sec. 34, shall not warrant summary ejection of the tenant, but shall entitle the proprietor to apply to the Sheriff for a warrant of summary ejection. The third specifies the period of notice, viz., forty days before the term of ish.

Sec. 38 consists of only two heads. The first provides that in the case of these shorter lets of less than a year with which it deals, any person, by law authorised, *i.e.*, as rule 115 explains, the proprietor or his factor or other mandatory, may present the summary application for removing to the Sheriff, decree in which shall be a warrant for ejection; and the second provides the period of notice for these shorter lets, viz., one-third of the whole period from the ish, with a maximum of 40 days.

Now, it will be observed that the two heads of sec. 38 are the exact counterparts, for the shorter lets of heads 2 and 3 of sec. 37 for the longer lets, and that the first head of sec. 37 prescribing the character of the notice stands apart at the head of all these provisions as to removings from houses and heritable subjects other than land of more than 2 acres in extent. The provision as to length of notice in sec. 38 is obviously incomplete. It must refer to some particular kind of notice, and, if it did not refer to that specific kind of notice set out at the head of these provisions but to some other kind, can it be supposed that this different kind of notice applying to this same class of subjects would not have been set out specifically in sec. 38? I am forced by these considerations to the conclusion that the notice referred to in sec. 38 is the written notice specified at the head of sec. 37, and no other.

A reference to the terms of the statutory rules confirms that construction of the statute proper. The form of notice mentioned in rule 112 is correctly described as notice under sec. 37; but that does not imply that a similar notice *mutatis mutandis* is not required under sec. 38. Nor can that implication be drawn from the absence of a separate form of notice under the latter section, because it is only a simpler version of that referred to in rule 112. Then when rule 113 is referred to, it is plain that notices under sec. 38 are expected to be in writing from the methods by which that rule provides that they may be given, in common with

all the other removal notices under the statute. It is true, as was pointed out for pursuer, that the language of that rule is permissive and not imperative, but any force which the observation might have is largely discounted by the alternative methods of giving written notice which the rule sanctions, and it must also be kept in view that by the terms of sec. 39 of the statute the permissive words in the rules of procedure seem to be virtually translated into imperatives.

Upon a true construction of the statutory provisions I am of opinion that notice of removal in writing is required to found proceedings under sec. 38, and that as no such notice was given in this case, the action is incompetent and must be dismissed with expenses. J. S. M.

For pursuer—Mr. C. P. M'NEIL (Messrs. M'Neil & Rowan), Greenock.

For defender—Mr. HUGH D. GLEN (Messrs. J. & H. D. Glen), Greenock.

SHERIFF COURT OF LANARKSHIRE.

SARAH FLEMING, *Pursuer;* WILLIAM FARMER, *Defender.*

Affiliation and aliment—Question involving status—Competency—Pater est quem nuptiæ demonstrant.—(1) An action of affiliation and aliment is primarily an action of debt, and it is not incompetent for the Sheriff to inquire into and, if necessary, decide incidentally a question of status on the way to arriving at a conclusion whether the defender is due the debt. (2) The maxim, *pater est nuptiæ demonstrant*, is only a *presumptio juris*, which may be redargued by proof. Pursuer's averments *held* relevant to entitle her to proof

In this action the pursuer craved the Court to find and declare that defender was the father of an illegitimate child to which pursuer gave birth, and to grant a decree against the defender ordaining him to pay inlying expenses and aliment.

The averments of the pursuer as contained in her condescendence were as follows:—

The pursuer, who lives at 41 Nelson Street, Largs, was on 8th January, 1910, married to Andrew Dickson, engineer's fitter, of 131 Hill Street, Dennistoun, Glasgow, and was on 21st July, 1920, divorced by the said Andrew Dickson. The defender, who is a partner of the Anchor Steel Company, Shettleston, Glasgow, and chairman of directors of the St. Mirren Football Club, resides at 5 Gartocher Terrace, Shettleston, Glasgow, and was the co-defender called in the

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action of divorce by the said Andrew Dickson against the pursuer.

The pursuer first met the defender towards the end of September, 1919. Next day he took the pursuer to Aberfoyle in his motor car, and two days after their first meeting the defender called at the house of pursuer's husband at 131 Hill Street, Dennistoun, Glasgow, during the daytime while her husband was out at work, professed love and affection for the pursuer, and prevailed on her to commit adultery with him. During the months of October, November, and December, 1919, and January, February, March, and April, 1920, the defender took the pursuer out for motor car runs or by train two or three times every week. They visited amongst other places Aberfoyle, Dunfermline, Arrochar, and various places in Renfrewshire and Ayrshire. The defender, who is a man of considerable means and good position, made the pursuer many presents, and within a few weeks of their first meeting bought her a ring. He also gave her brandy and whisky continually. During the said months the pursuer and defender committed adultery together three, four, or five times every week at the pursuer's husband's house at 131 Hill Street, Dennistoun, Glasgow, during his absence in the defender's office and at various places in and out of Glasgow which they visited. The last act of adultery committed between the pursuer and defender took place in the defender's motor car on the evening of Saturday, 24th April, 1920, about ten o'clock, while the said motor car stood in a side road near Barrhead. During the last few months of 1919 and during 1920 the pursuer and her then husband, the said Andrew Dickson, though living in the same house, occupied different bedrooms, and did not cohabit or have intercourse together. The pursuer admitted having signed the confession founded on by the defender, which was referred to for its terms, beyond which no admission was made.

As a consequence of the defender's adultery with the pursuer she became pregnant of a child by him. The pursuer was delivered of said child, named William Farmer Fleming, at 41 Nelson Street, Largs, on 17th December, 1920, and the defender is the father of this child.

The defender refuses to acknowledge paternity of the said child, as also he refuses to pay the inlying expenses of its birth and aliment, and the present action has thus been rendered necessary.

The defender pleaded (1) the action is irrelevant; (2) all parties not called; (3) the action involving the status of the said child is incompetent in the Sheriff Court; (4) *pater est quem nuptia demonstrat.*

The Sheriff-Substitute (LYELL) issued the following interlocutor:—

GLASGOW, 1*st June*, 1921.—Having considered the closed record and heard parties' procurators, repels the first three pleas in law stated for the defender, and before further answer allows to the parties a proof of their averments, and appoints the cause to the diet roll of 13th current.

WILL. DARLING LYELL.

Note.—The defence to this action of affiliation and aliment raises a novel and interesting point. The pursuer avers that, being a married woman, she was divorced from her husband on 21st July, 1920, the defender being called as co-defender in the divorce proceedings. She avers many acts of connection with the defender, beginning in September, 1919, and finishing on 24th April, 1920. During the last few months of 1919, and during 1920, though living in the same house with her husband, she states that she occupied a separate bedroom and had no sexual intercourse with him. A child was born to her on 17th December, 1920, of which she avers that the defender is the father.

The defender pleads in the first place that this action, being in effect a declarator of bastardy, is incompetent in the Sheriff Court. Doubtless an action which involves directly and primarily a question of status is incompetent here, with the modern exception of an action for separation and aliment. But this action is primarily an action of debt (see Dove Wilson, p. 54, *voce* "Actions of Aliment"), and it is not incompetent to inquire into and decide incidentally a question of status on the way to arriving at a conclusion as to whether a defender is due and resting-owing a sum of money (*Wright* v *Sharp*, 1880, 7 R. 460; *M'Donald* v *M'Kenzie*, 1891, 18 R. 502). It is quite true, however, that a decision against the defender here would have no effect in any question which the child may hereafter raise as to his legitimacy. It would not be *res judicata*, seeing that the child is no party to this cause and the *media concludendi* are different. I must therefore repel the plea to the competency.

The plea, "all parties not called," must be repelled on the same principle. The conclusions of this action, even if sustained, would not affect the question of the child's legitimacy, and he has therefore no interest to oppose the granting of the decree here sought.

It is further urged that the averments of the pursuer are irrelevant, in respect that she was admittedly a married woman living in the same house with her husband at the time

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of the conception. But the maxim, *pater est quem nuptiæ demonstrant*, is only a *presumptio juris*, which may be redargued by proof (*Montgomery* v *Montgomery*, 1881, 8 R. 403; *Steedman* v *Steedman*, 1887, 14 R. 1066; *Tennent* v *Tennent*, 1890, 17 R. 1205). Now, the pursuer makes a distinct averment that no intercourse took place between her husband and herself during the last months of 1919, and the whole of 1920. It is true that she may have difficulty in proving that averment, seeing that during that period she lived in the same house with her husband, and that in her signed confession, quoted on record, she dates the last act of connection with him six weeks before April, 1920; but, having made a relevant averment, she must have an opportunity of proving it if she can. W. D. L.

For pursuer—Mr. W. Menzies Anderson (Messrs. West, Anderson, & Rankin), Glasgow.
For defender—Mr. Gilbert Gunn, Glasgow.

No. 19.

Lanarkshire
Corporation of Glasgow v Northcote, &c.

The Corporation of Glasgow, *Pursuers and Nominal Raisers;* Arthur Northcote and Wylie & Lochhead, Limited (Wylie & Lochhead being Real Raisers).

Lost property—Ownership—Articles left in taxi-cab—Competing claims of driver and the cab owners.—Held that an employee of cab proprietors was not entitled to possession of property left in a cab, which property he was by the rules of his employment bound to hand over to his employers; and that the claim of his employers to possession of it was preferable.

Carriage hirers employed a driver, who was subject to service rules, which, *inter alia*, directed that property left in a cab by the hirer should be handed in to the cab office. Certain articles left in a motor brougham were handed by the driver who found them there to his employers, and not claimed for over a year. The driver claimed that, as the finder, he had become the owner. In this action of multiplepoinding brought to determine the ownership, the Sheriff-Substitute (Fyfe) sustained the claim of the carriage hirers and refused that of the driver in the following interlocutor:—

June 28, 1921
Sheriff Fyfe

Glasgow, 28*th June*, 1921.—Having heard parties' procurators and considered the cause, finds (1) that the claimant Northcote was a motor driver in the employment of the claimants, Wylie & Lochhead, from 21st December, 1914, till 26th March, 1918; (2) that it was a condition of his service contract (see No. 10/1 of process) that "any articles found in cars must be handed in to office, with name and address, if possible, of last hirer"; (3) that during said

period, on various dates, the articles forming the subject *in medio* were by various hirers of the brougham left in a motor brougham belonging to Wylie & Lochhead, which Northcote, as a servant of Wylie & Lochhead, was accustomed to drive; (4) that, on each occasion, under the above quoted service condition, Northcote handed in articles left in the brougham to the hiring office of Wylie & Lochhead, whose clerk took possession of them; (5) that, no person having appeared to claim any of the articles, Wylie & Lochhead handed them to the custodier of lost property, an official of the nominal raisers, appointed under section 75 of the Glasgow Police Act, 1866; (6) that the custodier still holds the articles: Finds in law that, the custodier being now bound to return the said articles to Wylie & Lochhead, their claim should be sustained; therefore prefers the claimants, Wylie & Lochhead, to the subject *in medio;* decerns for delivery of said articles to them; and on delivery exoners the nominal raisers as craved; finds the claimant Northcote liable to the claimants, Wylie & Lochhead, in expenses; allows an account to be given in, and remits to the Auditor for taxation. T. A. FYFE.

Note.—The articles which form the subject *in medio* are of trifling money value; but the principle involved in the case is of supreme importance to a very large number of people, including hiring contractors, hotel-keepers, railway companies, hall-keepers, passenger ship owners, and many others.

The question involved is, briefly, whether an employee who discovers that articles have been inadvertently left within, or upon, the private property of his employer, is a finder of lost property within the meaning of the doctrine expressed in the maxims, "*Quod nullius est fit occupantis*," or "*Occupantis fiunt derelicta.*"

Upon this question there is a singular dearth of judicial authority, and in the few cases reported there is, with one exception, the very important difference from the present case, that the person claiming to be a finder of lost articles was a member of the public. So far as I know, there is no reported case relative to an employee, except the case of the *South Staffordshire Water Company* v. *Sharman*, 1896, 2 Q.B.D. 44.

In that case the claimant was an employee of a sort, but he was much nearer to being a member of the public than the employee in the present case is, for he was a mere casual labourer—not a servant in regular employment—and he was under no special contract of service; and in particular he had not undertaken to hand over found articles to his employer. Yet the Court rejected his claim to the possession of two gold rings, which were found in the mud at the

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bottom of a pool, situated within his employer's private policies, which he and other casual labourers had been employed to clean out.

It was strongly urged by Mr. Grier that this case is to be disregarded because it turned upon the law of land ownership, the theory of which is that the ownership of land carries with it a right to possession of everything which is upon the land. But I do not read the judges' opinion as limiting the operation of the principle upon which they decided the case to land. They drew a distinction between an article found upon or within private premises and an article "cast into a public place, or into the sea—into a place, in fact, of which it could not be said that any one had a real *de facto* possession."

It does not seem to me to matter whether the private property where a thing is left is land, or a house, or a hall, or a cab, if the article was, to use the words of Justice Patteson, "within the protection" of the owner of the private place where the article was found (*Bridges* v. *Hawkesworth*, 21 L.J. Q.B. 75). In that case a customer in the public part of a shop—open to any member of the public — dropped a bundle of bank notes. Another member of the public, not an employee of the shopkeeper, who came into this public place, picked up the notes. No one appearing to claim them, the Court held entitled to possession against the shopkeeper, the member of the public who had picked them up in the public place, on the ground that the notes were never in the custody of the shopkeeper, and were never "within the protection of his house."

In the present case, I do not think the articles which form the subject *in medio*, in the legal meaning of the term, ever were "lost property" at all. Articles which are within the protection of the owner of a house, or of a cab, are not lost. They are left. If the owner of any of these articles had recollected next morning having left them in the brougham, he or she would not have applied to Northcote, but to Wylie & Lochhead for them.

If I go into a crowded tearoom and lay my gloves on the table and forget to lift them when I leave, the gloves are not "lost"—they are left in the protection of the proprietor of the tearoom. I do not think it can be said that the first waitress who happens to notice the gloves on the table, and who hands them in to the office, is a finder of lost property. If I drop them on the street, or any other public place, and a member of the public picks them up, he may perhaps be properly described as a finder of lost property; but in my opinion this is not so when in private premises an article is simply forgotten. That article is not lost—

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it is only forgotten, and left in the custody of the owner of the house, or hotel, or restaurant, or cab where the article was forgotten to be lifted. The things which were left in this brougham were not *derelicta*. They all had been appropriated to an owner, although the identity of the owner happens at the moment to be unknown; and "things already appropriated, but lost, forgotten, or abandoned, fall under a different rule from that which regulates things that have never been appropriated" (Bell's Prin. sec. 1291).

The Glasgow Police Act, 1866, sec. 135, imposes a penalty upon a person who finds lost property and fails to inform the police; but this, I think, applies to property found in a public place, not to property left in a private place, which has a known owner. I do not think Northcote could have been prosecuted under this Police Act. If anybody could have been prosecuted it would have been Wylie & Lochhead, and I very much doubt whether a prosecution would have lain against them. At any rate, the question between them and the police authorities is one thing. The question between them and Northcote, their servant, is a quite different thing, and I do not think that sec. 135 comes into the present question at all.

In the whole circumstances I am of opinion that the claim of Wylie & Lochhead should be preferred in this multiplepoinding action. T. A. F.

On appeal, the Sheriff (MACKENZIE) adhered, in the following interlocutor:—

Oct. 24, 1921

Sheriff A. O. M. MACKENZIE

GLASGOW, 24*th October*, 1921.—The Sheriff, having considered the cause, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute dated 28th June, 1921, complained of, and decerns; finds the claimant Northcote liable to the claimants Wylie & Lochhead, Limited, in the expenses of the appeal; directs that the expenses in the cause shall be taxed on the lower scale; and remits the cause to the Sheriff-Substitute, with power to decern for the expenses now found due. A. O. M. MACKENZIE.

Note.—I agree with the Sheriff-Substitute. In my opinion the case is distinguished from *Bridges* v. *Hawkesworth*, 21 L.J. Q.B. 75, and the *Great Western and Metropolitan Railway Company* v. *Emanuel*, 1866, L.T.J. 227, in respect that the claimant Northcote, who found the articles which form the subject *in medio*, was an employee of the owners of the taxi-cab in which the articles had been left, and was expressly bound by the terms of his contract of service to hand them over to his employers, Messrs. Wylie & Lochhead. Accordingly, when he took possession of the articles he took possession of them, I think, on behalf of Messrs. Wylie & Lochhead, and I can find no reason for hold-

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ing him entitled to demand that they should be returned to him in the event of the true owners not being discovered. I do not find it necessary, therefore, to determine whether the articles left in the taxi-cab were derelict when they were found, but I think that there is much to be said for the view that they were at that time within the protection of Messrs. Wylie & Lochhead, in respect that they were in a taxi-cab belonging to them and in charge of a driver whom they employed.

On the question of expenses I have failed to find any sufficient reason for holding that the real raisers and successful claimants, Messrs. Wylie & Lochhead, should be only found entitled to expenses on the small debt scale. There is at least a doubt whether the action could competently have been brought in the Small Debt Court, as the identity of the common debtors was unknown, and they, therefore, could not have been called as parties to the action, and it is also a consideration pointing to the same conclusion that the articles have not been valued, and that it is difficult to assume without evidence that they are of less value than £20. A. O. M. M.

For the Corporation—Sir John Lindsay.
For the real raisers (Wylie & Lochhead, Ltd.)—Messrs. John E. Wilson & Foulis, Glasgow.
For claimant (Northcote)—Mr. Geo. Macleod Grier (Messrs. A. R. Ferguson Grier & Co.), Glasgow.

No. 20.
Lanarkshire
Kennedy v Peebles

Hugh Kennedy, *Pursuer;* Mrs. Mary Ann Douglas or Peebles and A. Peebles, *Defenders.*

Husband and wife—Married Women's Property Act, 1877—*Liability of husband for debt contracted by wife antenuptially, but after proclamation of banns.—Held* that, not being *lucratus* by the marriage, the husband was not liable.

In this small debt case the pursuer, a baker, sued a husband and wife for the price of a bridescake, which he averred had been ordered by the female defender, after proclamation of banns. The Sheriff-Substitute (Fyfe) issued the following judgment:—

July 4, 1921
Sheriff Fyfe

Glasgow, *4th July,* 1921.—Finds that no relevant case has been laid against the male defender; *quoad* him dismisses the action; finds the male defender entitled to 13s. 4d. of expenses, and decerns against the pursuer for payment thereof. No appearance being made by or for the female defender, in absence, decerns against her for payment as craved, with 14s. 11d. of expenses. T. A. Fyfe.

Note.—It is not averred, and it is not suggested, that the male defender was *lucratus* by his marriage to the female defender. The person who orders an article is the

person liable for payment of the price of it. That person was not the male defender. If the female defender ordered the cake before her marriage, as it is said she did, although there is no proof of it, then the cost of it was an ante-nuptial debt of the female defender; and sec. 4 of the Married Women's Property (Scotland) Act, 1877, absolves the male defender from liability. Pursuer asks me to qualify this modern statute by reading into it a doctrine said to have been promulgated 250 years ago in the case of *Neilson* v. *Guthrie*, Mor. 5878, that *quoad* liability for debt, proclamation of banns was "marriage" within the meaning of sec. 4 of the 1877 statute. I think this is too fantastic, even if that would help the pursuer's case, which it would not; as, against the male defender, it is not proved, and he does not admit, for he does not know, either that the order was placed by the female defender, or that it was placed after proclamation of banns. As the female defender does not appear to dispute these facts, they may be held as admitted by her, but that does not commit the male defender. There is no averment, and no proof, that the male defender adopted the contract made by somebody with the pursuer to supply the cake. The suggestion is that, by being present at the wedding party and assisting with the other guests in the consumption of the cake, the male defender adopted the contract. There is no proof that he ate a morsel of the cake; but even if he did, the idea that he thereby adopted the contract made by some other person with pursuer is also fantastic in the extreme.

In the ordinary case, the contractors for a bride's cake are the bride's parents or guardians, and if the female defender placed the order, she may have been acting as the agent of these persons; but it is too ludicrous to suggest that she was acting as the agent of the male defender, or that pursuer ever regarded him as his debtor. T. A. F.

For pursuer—Mr. T. C. Young, Glasgow.
For defender—Mr. Gilbert Gunn, Glasgow.

SHERIFF COURT OF RENFREW & BUTE.

William George Robb, *Pursuer;* Durward Lely, *Defender.*

Process — Jurisdiction — Actor — Actor-manager — Carrying on business—Place of business—Sheriff Courts Act, 1907, *sec.* 6 (*b*).—An actor-manager on tour with his company and fulfilling a week's engagement at a theatre, owned, occupied, and licensed by third parties, has not a place of business there so as to give jurisdiction in the sheriffdom in which such theatre is located.

This was a Small Debt case brought in the Sheriff

Renfrew and Bute

Robb v Lely

Court of Renfrew and Bute at Greenock, in which—to give the instance in the summons—Durward Lely, King's Theatre, Greenock, was sued by pursuer for damages for breach of contract, amounting to £13 8s. 1d., being salary and travelling expenses. The facts of the case are sufficiently stated in the subjoined written opinion issued by the Sheriff-Substitute (Mercer):—

Nov. 9, 1921

Sheriff Mercer

Greenock, *9th November*, 1921.—This is an action of damages for alleged breach of contract, and the only question argued was the preliminary one of whether the defender was subject to the jurisdiction of the Court. According to the joint minute of admissions lodged for the parties, the pursuer is an actor residing in Glasgow, and the defender an actor or actor-manager residing at Blairgowrie. The contract between the parties in respect of which the alleged breach took place provided that the pursuer should tour with the defender in his company through various Scottish towns, presenting a drama during the winter of 1920-1921. The dismissal of the pursuer took place on 10th November, 1920, while the parties were playing at Larbert, in Stirlingshire. The defender came to Greenock on 3rd October, 1921, to fulfil a seven days' engagement at the King's Theatre, which is owned, occupied, and licensed by third parties. He left on the completion of his engagement upon 10th October. The summons was served upon him personally in Greenock on the 3rd. The pursuer at the hearing asked judgment on jurisdiction only under the Sheriff Courts Act, 1907, sec. 6 (*b*), which provides that "any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff where the defender carries on business and has a place of business within the jurisdiction, and is cited either personally or at such place of business." The condition of personal service is admittedly present, but the defender denies both of the other two conditions. I think it would be difficult for the defender to maintain that he did not carry on business, at the time of the citation, within the jurisdiction. In the corresponding provision in the Sheriff Court Act, 1876, the expression used is "trade or business," and there are weighty dicta for the view that "business" constitutes a wider category than "trade." Although there is no definition of the term "business" in the present statute, it is defined, for the analogous purposes of partnership, in the Partnership Act as including "every trade, occupation, or profession." I think, in these circumstances, that the defender might reasonably be held to have carried on business as an actor or actor-manager in the presentation of a play within the jurisdiction. But it is un-

necessary to decide that because I am satisfied that the other essential of jurisdiction under the section is absent in respect that he had no place of business within the jurisdiction in the sense of the statute. There is a wide sense in which, if he carried on business at all, he might be said to have a place of business, because it is impossible to conceive of a business being carried on except in relation to a place. But construed in that sense, the second condition of jurisdiction would be a mere synonym of the first which would violate a fundamental canon in the construction of statutes, viz., that each term must be construed as having a separate and definite signification. In view of its purpose, I think the provision must mean that the defender shall have a place of business which gives him such a fixed connection with the locality as makes it reasonable to hold him bound to answer a claim at law in the Court of jurisdiction. That is, that he shall have premises in his own name and right where business is carried on by him with a reasonable degree of permanency. That is absent in this case. The defender had only a fugitive use of theatre premises, owned, occupied, and licensed at the same time by third parties. A comparison of the case of a commercial traveller may be instructive. He might have accommodation in a hotel where he displayed samples of his goods and where merchants visited him and transacted business. If the hotel in that case were held to be a place of business in the sense of the statute, the result would be anomalous, for through a day's presence, with nothing but his sample case, he might be held bound, hundreds of miles from his home and permanent place of business, to answer an action at law about a matter which had no connection with the business done by him in that jurisdiction. I see no essential distinction between the case of the commercial traveller and the present case. I must, therefore, hold that the defender has no place of business within the jurisdiction in the statutory sense, and that his plea of "no jurisdiction" must be upheld. It is satisfactory that no serious hardship will accrue to the pursuer through this decision, because there is obviously a Scottish jurisdiction in which the defender can be sued.

For pursuer—Mr. JOHN FLOCKHART, Greenock.
For defender—Mr. ROBERT WILSON (Messrs. Neill, Clerk, & Murray), Greenock.

No. 22.
Fifeshire
Duncan *v* Provost, &c., of Cowdenbeath

SHERIFF COURT OF FIFESHIRE.

Robert Duncan, *Pursuer;* The Provost, Magistrates, and Councillors of the Burgh of Cowdenbeath, *Defenders.*

Deposit—Custody—Duty of reasonable care—Burgh—Public slaughter-house.—Circumstances in which a burgh council, the proprietors and managers of a public slaughter-house, were *held* responsible for the loss of carcases stolen out of the slaughter-house, in respect that they had not exercised their duty of custody of the carcases with reasonable care and diligence.

Robert Duncan, butcher, Cowdenbeath, sued the provost, magistrates, and councillors of that burgh for £50, being the value of the carcases of two pigs which he had killed in defenders' slaughter-house, and which carcases, having been left there overnight by him had been removed (presumably theftuously) from the slaughter-house and, in any event, had not been delivered to pursuer. He pleaded (1) "Defenders having the custody and control of pursuer's property, and having failed to deliver same to pursuer, are liable to him in damages." The defenders denied that there was any negligence in their supervision of the slaughter-house, and averred that pursuer was himself negligent in having left the carcases there overnight. They pleaded (3) "Defenders, not being responsible for the safe custody of said pigs, pursuer has no claim against defenders for their loss; (4) defenders having taken all reasonable precautions for securing said premises are not liable for any loss sustained by pursuer through the premises being broken into; (5) pursuer having by his own negligence in allowing said carcases to remain in said premises overnight, contributed to the loss he has sustained, has no claim therefor against defenders." The facts of the case are stated in the following interlocutor of the Sheriff-Substitute (Umpherston):—

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Dunfermline, 1*st November*, 1921.—The Sheriff-Substitute finds in fact (1) that the pursuer is a butcher in Cowdenbeath, and the defenders are the proprietors of and manage a public slaughter-house in Cowdenbeath; (2) that the defenders have enacted bye-laws for the regulation of said slaughter-house; (3) that on 6th April, 1921, pursuer by his servants killed two pigs belonging to him at said slaughter-house in accordance with said bye-laws; (4) that

at said date the practice of leaving the carcases of newly-killed pigs in said slaughter-house overnight in order that said carcases might cool and become firm before removal was ordinarily incidental to the process of slaughtering and dressing, and was acquiesced in by the defenders, who made provision to accommodate butchers in this practice; (5) that the carcases of the said two pigs were left in said slaughter-house during the night of 6th-7th April for the aforesaid purpose; (6) that during that night the slaughter-house was entered by some person or persons unknown and the said two carcases were stolen; (7) that a stoppage of work in the coal trade commenced on 31st March, 1921; (8) that Cowdenbeath was affected thereby, and that serious disturbances took place in said burgh; (9) that in particular on the night of 1st-2nd April the said slaughter-house was entered by some person or persons unknown when a live sheep therein was killed and stolen; (10) that the only precaution thereafter taken for the safe custody of pursuer's carcases was to repair the broken locks and to see that all other locks were in good order; (11) that the outer gate leading to the yard around the building of the slaughter-house was not secured, and could be easily opened by any person who climbed the wall (which was a common occurrence), and opened it from the inside; (12) that direct access to the pig-slaughtering booth, where the carcases belonging to the pursuer were, was obtainable from the outside of the building, by forcing a padlock on the gate of said booth, and that the forcing of this padlock could be effected without difficulty; (13) that on the evening of 6th April a hand-barrow was left in the yard of the slaughter-house, which was calculated to facilitate the removal of carcases stolen from booths of the slaughter-house; (14) that the only method of watching the slaughter-house was provided by the county constabulary, who included the slaughter-house in their ordinary patrol duty; (15) that on the night of 6th April there was a serious disturbance in the burgh of Cowdenbeath, and that the ordinary police patrols were thereby disorganised, and the slaughter-house did not receive the ordinary attention from the constabulary on the night of 6th-7th April; (16) that the defenders did not discharge their duty of custody of the carcases belonging to the pursuer with reasonable care and diligence in respect (*a*) that the premises were not efficiently guarded in the abnormal conditions which prevailed in the burgh at the time, (*b*) that the outer gate of the slaughter-house and the pig slaughter-house booth were not sufficiently secured, and (*c*) that an implement which was specially suitable for the

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removal of the carcases if and when stolen was allowed to remain in the open yard overnight: Finds in law that the defenders were guilty of negligence in failure to exercise reasonable care and diligence in the custody of the said carcases; or otherwise, that defenders were guilty of negligence in accepting the custody of said two carcases in circumstances which precluded them from giving reasonable care for their safe custody; therefore finds the defenders liable in damages to the pursuer; assesses the damages at fifty pounds sterling, and decerns therefor against the defenders; finds the pursuer entitled to expenses, allows an account thereof to be lodged, and remits the same to the Auditor of Court to tax and to report.

Fran. A. Umpherston.

Note.—A number of questions were canvassed in the course of the proof, and much time was wasted in a controversy which the defenders ought never to have raised. The pursuer averred that it was ordinarily incidental to the slaughtering of pigs that the carcases should be left overnight to become firm before removal, and that that was the invariable practice prior to April last, a practice in which the defenders had acquiesced. This was denied by the defenders, but the evidence in support of it was overwhelming, the only qualification (and that seemed to refer more to cattle than to pigs) being that carcases were sometimes removed immediately after slaughter by a few butchers who had in their own premises, and these not far removed from the slaughter-house, equivalent accommodation for the cooling and firming process. The unsupported assertion of the defenders' sanitary inspector that the defenders allowed this to go on on the honourable understanding that the butchers left the carcases in the slaughter-house overnight for their own convenience, and that in return the defenders did not undertake custody of the carcases cannot in the slightest degree affect the defenders' legal responsibility.

A stoppage in the coal trade commenced on 31st March, and this peculiarly affected Cowdenbeath, inasmuch as it is the centre of a large coal-mining district. On 2nd April the slaughter-house was broken into, and a live sheep was killed and the flesh was stolen. This was obviously a warning to the defenders to take special precautions for the safety of animals or carcases in the slaughter-house. The precautions which are said to have been taken were these, viz., the hasp and padlock on the main door which had been broken were repaired; the other lock on that door and the padlocks on the booths were examined and put in proper order; a lock was put on the door opposite

the main door; the superintendent of the slaughter-house was instructed to warn the butchers to keep as little stuff as possible, alive or dead, in the slaughter-house, and he was also instructed to tell the sanitary inspector (who is his son) if anything was left in the slaughter-house overnight in order that the latter might tell the police.

The burden is on the defenders to account for the loss of the carcases, and to do so in such a way as exculpates them from any charge of negligence. Their account of the manner in which the theft was accomplished was given for the first time in the evidence of the sanitary inspector. I say "for the first time" because the pleadings demonstrate this. The pursuer states his surmise as to the method of the thieves, viz., by opening the outside gate, forcing the padlock and removing the carcases in a hand-barrow by the main gate. The defenders' answer is—"Believed that the padlock of the pig slaughter-house was forced and the carcases removed by some person or persons unknown. *Quoad ultra* not known and not admitted." The evidence is that they knew on the morning of 7th April exactly how it was done, to whom the barrow belonged, where it was obtained, and how it was taken out of the yard. If that evidence is true, we may put aside the unsafe condition of the outer gate, as that was not a factor in the case.

The precautions said to have been taken were, in fact, not carried out. It is said in the defence that "the slaughter-house superintendent, immediately after the theft of the sheep, advised all persons using the slaughter-house, including the pursuer or his sons or servants, to leave overnight as little property as possible," an averment relative to the pursuer than which nothing could be more vague. It was only when the superintendent was in the witness-box that he stated the person whom he so advised to be the pursuer's son James, the place the pursuer's shop, and the times Saturday and Tuesday. As James Duncan was not present the first day of the proof I allowed him to be adduced as a witness after the defenders' case was closed on the second day, and he denied that the superintendent said anything to him about the subject. The superintendent also said that while the process of killing and dressing the pigs was going on he told pursuer's son David that the carcases should be removed that day; but he is contradicted in this by David Duncan, and also by three other witnesses who were present. On Wednesday, 6th April, the superintendent did not tell his son, the sanitary inspector, that carcases were to be left overnight in the slaughter-house, and consequently the police were

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not informed. There was a riot in Cowdenbeath that night, and only one visit instead of about four was paid by the police to the slaughter-house, about 2 a.m. on the 7th, when the place was found to be intact.

The only precaution, therefore, that was in fact taken to protect the pursuer's carcases in this time of tumult, and after the sheep had been killed and stolen on 2nd April, was to see that the locks and padlocks on the building were in order.

I think it is not without a general bearing on the situation to note that the bye-laws for the regulation of the slaughter-house are consistently ignored in practice, and one can hardly be surprised to learn from the evidence of Sergeant Anderson that the slaughter-house was again broken into a few weeks ago. One of the butchers, also, who gave evidence for the defenders, Mr. Carson, indicated that during the strike in October, 1920, he had lost something which had been left overnight.

The pursuer ascribed to the defenders a lack of requisite care in failing to have the slaughter-house sufficiently watched, special attention in this respect being called for by the prevailing circumstances. It was also argued when the facts had been disclosed in evidence that the method of securing the booths, viz., by padlocks on the outside which could be forced without much difficulty, gave insufficient protection. These padlocks on the outside of the booths were in ordinary circumstances convenient for the butchers. But this was so only owing to the disregard by the defenders of their own bye-laws. In spite of the bye-laws the slaughter-house is not opened in the morning at the hour when they require it to be opened. And in defiance of the bye-laws butchers are provided with keys of the booths, which they keep in their own possession. This is done in order that they may remove carcases which have been left overnight before the superintendent has opened the slaughter-house. For the same reason the outer gate is not properly secured, and can easily be opened by any person who climbs the wall and opens it from the inside. Another matter which is ancillary to those referred to, but was an important element in facilitating the theft, was that the hand-barrow was left in the open yard overnight. This must, indeed, have been a treasure trove to the thieves who, without it, would have had great difficulty in removing the carcases. The fact of this barrow being convenient is to my mind by no means unimportant.

The case is, I confess, a narrow one. But I have come to the conclusion that the defenders did not give such care to the protection of the pursuer's property as, in the

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circumstances, was incumbent on them, and that in the matters of watching the premises, of securing them from intrusion, and also the carelessness of allowing a convenient instrument to be at hand for enabling thieves to remove stolen goods. If the contents of the slaughter-house had been their own property, I think it would have been guarded more efficiently, and that the method of securing the booths would have been more effective. Further, I am satisfied that one course which the defenders might have taken for their own protection and also for that of the butchers was not taken, namely, to insist that the carcases of all animals slaughtered should be removed on the same day. This was an elementary precaution which did, apparently, occur to the minds of the defenders' officials. But they were negligent in not giving effect to it. This is not really negligence in custody; it is negligence in accepting a duty of custody which they were unable to perform. But if a person makes a contract for custody which he is unable to render reasonably secure, the principles of the law regulating that contract will enforce his liability for loss. F. A. U.

For pursuer—Mr. JOHN W. RUNCIEMAN (Messrs. A. Malcolm & Co.), Dunfermline.
For defenders—Mr. R. T. MILNE, Cowdenbeath.

SHERIFF COURT OF MIDLOTHIAN.

No. 23.
MIDLOTHIAN
Virtue, &c. v Skinner

Mrs. ANNIE VIRTUE and Others, *Pursuers;* CHARLES ALEXANDER SKINNER, *Defender.*

Master and servant—Workmen's compensation—Accident—"Arising out of"—Window cleaner found injured on premises—No direct evidence—Death of workman.—A window cleaner engaged in cleaning the windows of business premises was found lying in a dazed and injured condition on the basement floor below an open trap door in the floor above, and died soon thereafter without regaining consciousness. No direct testimony as to the cause of these fatal injuries was available, but it was *held* after proof of the facts and circumstances that they were caused by accident arising out of and in course of the workman's employment, and compensation was awarded to his representatives.

The judgment of the arbitrator, Sheriff-Substitute NEISH, which is given in the interlocutor (*infra*) contains a detailed account of the whole facts and circumstances attending the concurrence in question:—

Dec. 12, 1921
Sheriff NEISH

EDINBURGH, 12*th December*, 1921.—The Sheriff-Substitute, having heard counsel for the pursuers and the agent

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for the defender and considered the proof, productions and whole cause, and having consulted with the medical assessor, finds the following facts admitted or proved:—(1) The pursuers are the widow and five children of the deceased Robert Virtue; (2) the widow, Beatrice Virtue, and Katherine Virtue were wholly dependent upon the earnings, and Robert Virtue, Annie Virtue, and Matilda Virtue were in part dependent on the earnings of the deceased Robert Virtue; (3) Robert Virtue was, at the time of his death, in the employment of the defender as a window cleaner, and his average weekly earnings were £3 9s.; (4) about 7 a.m. on Monday, 7th March, 1921, Robert Virtue, along with his fellow workmen, Blair and Jones, began to clean the windows of the Clydesdale Bank office in Melville Place, Edinburgh; (5) the men began by cleaning the windows outside, and about 8.30 Virtue and Jones went into the building to clean the inside windows: (6) Jones went into the interior of the main office of the bank, thinking that Virtue was just at his back; (7) Jones opened one half of a trap door in the wooden floor of the main office in order to allow the heat from the basement to come up and thaw the windows, which were frosted; (8) the opening thus made by Jones was 2 ft. 3 ins. by 2 ft. 8½ ins. (see plan No. 10 of process); (9) the opening was directly opposite the entrance door to the interior of the main office, and its nearest edge was 7 ft. 6 ins. from the door; (10) there is a direct drop of 8 ft. 6 ins. from the opening to the floor of the basement; (11) the floor of the basement is made of concrete; (12) the main office of the bank is well lighted with three large windows; (13) the opening was 10 ins. from the breast of a window, the breast is 2 ft. 4 ins. high and the sill is 2 ft. 6 ins. broad; (14) access to the basement is got by a stair in the passage just beyond the entrance door to the interior of the main office; (15) in the basement there are a water closet, taps and stand for cleaners' pails, and a washhand basin (as shown in the plan No. 10 of process); (16) after Jones had opened the trap door he placed his ladder against the window furthest from the opening in the floor and in the corner between the window and the desk next the street entrance about 7 ft. from the opening; (17) Jones then went up the ladder about 3 ft. and started to clean the window; (18) if Jones was standing square on his ladder the opening would be to his right, but if he leaned in to clean the window on his left his back would be slightly turned to the opening; (19) the opening was in full view of Jones if he looked in its direction; (20) Jones, knowing that he had opened the trap door, had it in his mind to

warn any one whom he might hear coming into the interior of the main office; (21) Jones did warn his fellow workman, Blair, whom he heard approaching the door; (22) Jones, while working on his ladder, did not hear or see Virtue come into the main office where he was working; (23) Jones did not hear or see Virtue descend the stair to the basement, nor did he hear him walking about in the basement; (24) Jones, when working on his ladder, heard a slight thud and, on looking to the opening, saw Virtue lying on the floor of the basement below the opening; (25) no one else saw Virtue after he entered the bank till he was found in the basement; (26) there is no direct evidence as to what period of time elapsed between Jones going up the ladder to clean the window and his hearing the slight thud, but he entered the main office with Virtue about 8.30 a.m., and probably it was a very short period; (27) Virtue was carried up from the basement to the office above by Jones and Blair and, when seen by a doctor there, was in a dazed condition, not entirely conscious, and not unconscious; (28) Virtue was then removed to the Royal Infirmary, where he died on the following day, 8th March, 1921, at 7.30 a.m.; (29) a post-mortem examination was performed on the head only of Virtue on the same day; (30) there was no gross external wound, but widespread bruising of the scalp over the back of the head; a large hæmorrhage was found between the dura mater and the bones of the posterior fossa; an extensive comminuted fracture of the occipital bone (*i.e.*, of the bone forming the posterior fossa of the skull) was present; there was no fracture of the middle or anterior fossa of the skull; the brain exhibited surface hæmorrhage and also laceration of and hæmorrhage into its substance in the right occipital, left temporal, and left frontal areas; the skull was not noticed to be unduly thin; (31) death was due to fracture of the skull and cerebral laceration; (32) Virtue was a lightly built man about 5 ft. 4 ins. in height; (33) the injuries found at the post-mortem might have been caused by Virtue falling from his own height on to a concrete floor, but the extent and character of these injuries were more consistent with his falling from a height; (34) Virtue appeared at his work on the morning of 7th March with a black eye; (35) this black eye did not cause or contribute to the injuries which resulted in Virtue's death; (36) apart from the black eye it was not proved that Virtue was otherwise than in normal health on said 7th March; (37) Virtue was entitled in the course of his employment to go to the water closet in the basement and to the washhand basin or cleaners' taps and stand for the purpose

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of washing his cleaning cloths; (38) the injuries which resulted in Virtue's death were caused either by his falling through the open trap door on to the concrete floor of the basement or by falling from his own height on to the said floor; (39) if Virtue fell from his own height the injuries to his head could only have been caused by his falling on a hard substance such as the concrete floor on which he fell; finds in fact and in law that Virtue's death resulted from personal injury by accident arising out of and in the course of his employment: Finds in law that the pursuers are entitled to compensation, and assesses the same at £300; therefore awards the pursuers the sum of three hundred pounds sterling in name of compensation, and reserves all questions as to the allocation of the compensation; orders that the defender pay the said sum of £300 to the Clerk of Court within ten days from this date; finds the defender liable to the pursuers in the expenses of process; allows an account thereof to be given in and remits the same, when lodged, to the Auditor of Court to tax and report. E. W. Neish.

Note.—I have found this a difficult case. I need not recapitulate the facts, because I have set them forth fully, and I fear at great length, in my interlocutor, and I do not think there is much dispute as to the facts.

The defence stated on record (answer 2) is that the deceased's death was due to head injuries sustained by him prior to 7th March, or, at any rate, prior to his commencing work on that day, and occasioned by a street accident or some other cause to the defender unknown. I think this defence was based on a misreading of the post-mortem report as shown in the cross-examination of Dr. Todd (No. 13 of process) to the effect that there was a fracture of the anterior fossa. The report (No. 12 of process) shows that there was no fracture of this fossa. I understand that this particular defence was given up at the hearing. At any rate I am quite satisfied that so far as a negative can be proved the evidence establishes that the injuries revealed by the post-mortem examination could not have been caused previous to 7th March, and I am so advised by the medical assessor.

There may be a possible explanation of the accident in the succeeding words in answer 2 to the effect that "the deceased was seized by giddiness and fainting due to the said injuries," which I take to mean the injury revealed by the black eye. It is right that I should say that a great deal of the defender's proof was directed towards establishing this theory. The alleged statement by Mrs. Virtue to defender and his wife to the effect that Virtue

had complained to her of illness on the morning of the accident and the cross-examination of Mrs. Virtue and her son are all directed to this end. I am, however, not able to find as a matter of fact that, if Virtue fell his own height, his fall was due to giddiness. It might have been caused by his stumbling or tripping. If, however, the defender has proved this theory, then clearly, I think, the case is ruled by the decision in *Wright & Greig* v. *M'Kendry*, 1919, S.C. 98. I do not think any distinction can be drawn between a previous blow or a uræmic fit causing giddiness.

On the other hand the pursuers' case on record is that the deceased fell through the trap door. On the evidence I think there is much to be said for and against the pursuers' contention that they have proved this averment. Against their contention there is the smallness of the opening. I think it is possible that a slightly built man might fall through the opening feet first, landing on his buttocks and striking the back of his head. It all depends where he put his foremost foot, and how close his rearmost foot was behind. On the other hand there is a good deal in the theory that in falling he would have been momentarily caught by his legs or his arms, which probably he would instinctively throw forward. At the post-mortem no examination was made of the deceased's body for bruises. Only the head was examined. Then, again, Jones says he had the open trap door in his mind, and was on the alert to warn any one coming in. He did in fact warn Blair, yet if the deceased fell through the trap door Jones never heard him come in. On the other hand, Jones may have been immersed in his window cleaning and momentarily forgotten the trap door and the warning he intended to give, and for the same reason may not have heard the deceased come in. When on his ladder his back would be to the door, and if looking at the window he was cleaning in the left corner his face would be turned away from the trap door.

I am bound to say that the strongest evidence that the deceased must have fallen through the trap door is contained in the evidence by Dr. Alexander, who made the post-mortem. I think I am right in saying that this witness is emphatic to the effect that the injuries he found could only have been caused by a fall from a height, and I confess that I was impressed with this opinion at the time. On the other hand, Dr. M'Kendrick gives a case in his own experience of similar injuries caused by a man falling his own height; although in this case we, of course, do not have an exact pathological description of the in-

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juries. If I had been able to say, upon the medical evidence, that it was not possible that the injuries found could have been caused except by a fall from a height, I think I should have found that the deceased fell through the trap door, but I cannot exclude the possibility of the injuries having been caused by deceased falling his own height, and I am advised by the medical assessor that although it is much more probable that the injuries were caused by a fall from a height, it is possible that they were caused by the man falling from his own height on the concrete floor.

I think, however, there can be no doubt that the injuries which resulted in death were caused either by the deceased falling through the trap door or by his falling from his own height upon the concrete floor. If he fell through the trap door, then I think it cannot be disputed that the injuries which caused Virtue's death resulted from an accident which arose out of and in the course of his employment.

There remains the more difficult question whether, if Virtue fell from his own height on to the concrete floor, the injuries which caused Virtue's death resulted from an accident arising out of and in the course of his employment. I have little doubt that accident is established. Suicide and foul play being excluded, I think accident is the necessary and only inference, or, at least, an inference which a reasonable man might draw. I do not think it is necessary for the pursuers to establish "the particular way in which he fell or the particular thing he was doing when he fell" (*Lendrum* v. *Ayr Steam Shipping Co., Ltd.*, 1914, S.C. (H.L.) 91, per Lord Loreburn at foot of p. 92). I think that case is useful both on the question of "accident" and on the question of "arising out of the employment."

Next I think that, granted that Virtue was entitled to go to the basement for the purposes which I have found or even for getting a drink, it is a reasonable inference that he was in the basement for some purpose connected with his employment, and that the accident arose in the course of his employment. I think it is true that the onus of proof may constantly shift in these cases, and there is no suggestion in the case that Virtue was in the basement for his own purposes merely or for an illegitimate purpose which would take him out of the course of his employment.

The last, and probably most difficult, question is, whether the accident arose out of the employment? On this question I do venture to think that an affirmative answer is justified by the case of *Wright & Greig* v.

M'Kendry, 1919, S.C. 98. It is true that in that case the cause of the fall, viz., giddiness, caused by a uræmic fit, was ascertained, whereas here the cause is not ascertained; but I have already dealt with that point. Further, there appears in the case quoted to have been a slight slope on the concrete floor; but I do not find that this fact is made a ground of judgment, and I notice that the fact that there was a slight slope is not mentioned in the rubric to the case. Apart from the difference of opinion in that case as to the immediate cause of the accident, it appears to me that the ratio of the decision was that the workman "was by the conditions and incidents of his employment engaged at the time of the accident at a place which turned out to be a place of special danger, because, but for the hard concrete floor the fatality would not or might not have occurred" (per Lord Justice-Clerk at p. 101). It is true that in this case Virtue was not working all the time on a concrete floor, because the upper floor was of wood, but once the inference is made that his work legitimately called him to the concrete floor then I think the ratio applies in this case just because the nature and extent of his fatal injuries could only have been caused by his falling on the hard concrete floor.

On the whole matter I am of opinion that the injuries which caused Virtue's death resulted from an accident arising out of and in the course of his employment, and I shall award compensation to the pursuers.

E. W. N.

A minute requesting the Sheriff to state a case for the decision of the Court of Session on certain questions of law was lodged, but was subsequently withdrawn.

For pursuers—Mr. W. R. WALKER, advocate, instructed by Mr. J. M. Gow, Edinburgh.
For defender—Mr. ISAAC FURST, Edinburgh.

SHERIFF COURT OF LANARKSHIRE.

HANDY WASHER SYNDICATE, LIMITED, *Pursuers;* LOUIS VANDERAA, *Defender.*

No. 24.

LANARKSHIRE
Handy Washer Syndicate, Ltd. v Vanderaa

Process—Title to sue—Unregistered proprietor of a patent—Amendment of instance—Patents and Designs Act, 1919, *sec.* 16 (4).—*Held* (1) that an assignee of a patent who had not entered his name as proprietor on the Register of Patents could not maintain an action for infringement, but (2) that amendment of the instance by conjoining as a pursuer the person originally registered, and adding an averment that the

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assignee's title had now been registered, was competent, and action allowed to proceed.

This was an action for interdict against the alleged infringement of a patent in which interim interdict was granted at the date of raising the action the defender had already lodged with the patent office a provisional specification for a patent and had obtained provisional protection. The original owner of pursuers' patent was James Alexander Martin who sold his rights to Robert Henderson and the patents were subsequently acquired by the pursuers the Handy Washer Syndicate, Limited, as at the date of the raisiug of this action the registered proprietor of the letters patent was the said James Alexander Martin. A record was made up and the case was debated on defender's preliminary plea of no title to sue, whereupon the Sheriff-Substitute (Fyfe) issued this interlocutor:—

July 12, 1921

Sheriff Fyfe

Glasgow, 12*th July*, 1921.—Having heard parties' procurators, sustains defender's third plea; recalls the interim interdict; dismisses the action; finds the defender entitled to expenses; allows an account thereof to be given in, and remits to the auditor for taxation. T. A. Fyfe.

Note.—This action was raised on 14th May, 1921. The question is whether at that date the pursuers, the Handy Washer Syndicate, Limited, had a title to sue. On their own showing they had not, for the only person who could maintain an action for infringement of patent was the registered patentee, for under the Act of 1919 the person entitled to sue is a person entered on the register as proprietor of the patent. On their own showing the pursuers did not answer that description, and their want of title to sue is not cured by conjoining the patentee as a consenter.

The action might perhaps have been competent at the instance of Martin, with concurrence of Henderson and the Handy Washer Syndicate for their interest, but, as it stands, these pursuers had no title at 14th May to bring this action, for they did not acquire a title on pursuers' own showing till 8th June, 1921, even assuming that the indenture (No. 7/10 of process) without registration conferred that title upon them, which I do not think it did.

T. A. Fyfe.

The case was appealed to the Sheriff (A. O. M. Mackenzie), and a minute of amendment lodged upon which the Sheriff issued judgment as under. The extent of the amendment is described in his lordship's interlocutor:—

GLASGOW, 22*nd November*, 1921.—The Sheriff, having considered the cause, opens up the record; allows the productions specified in the additional inventory of productions for pursuers (No. 13 of process) to be received; allows the pursuers to amend the petition in terms of the minute of proposed amendment (No. 11 of process), and the said amendment having been made, allows the defender to amend the defences in terms of the minute of proposed answers (No. 12 of process), and the said amendment having been made, of new closes the record: Sustains the appeal; recalls the interlocutor of the Sheriff-Substitute, dated 12th July, 1921; repels the third plea in law for the defender; continues the interim interdict formerly granted until the further orders of Court: Finds the pursuers, the Handy Washer Syndicate, Limited, liable to the defender in expenses from the date on which the record was closed; allows an account thereof to be given in and remits the same, when lodged, to the Auditor of Court to tax and report; and remits the cause to the Sheriff-Substitute to proceed as accords, with power to decern for the expenses now found due.

A. O. M. MACKENZIE.

Note.—This is an action for interdict against the infringement of certain letters patent for an improved washer, and for damages. As originally brought, the action was at the instance of the Handy Washer Syndicate, Limited, with the consent and concurrence of a certain James Alexander Martin, the registered propriotor of the letters patent. The pursuers averred that they had acquired the letters patent from Mr. Martin, but it was admitted that Martin was still on the Register of Patents as the proprietor. The defenders plead on record that the pursuers have no title to sue, and argued before the Sheriff-Substitute in support of this plea that the only person entitled to sue such an action as the present was the registered proprietor of the letters patent said to be infringed, and that the concurrence of the registered proprietor in the action did not cure the defect in the pursuers' title. The Sheriff-Substitute upheld this contention, sustained the objection to the pursuers' title, and dismissed the action. His decision was founded upon sec. 16, sub-sec 4, of the Patents and Designs Act, 1919, which provides that, except in certain special applications, a document or instrument in respect of which no entry has been made in the register shall not be admitted in evidence in any Court in proof of the title to a patent or to any interest therein unless the Court otherwise directs. It will be seen that the subsection does not expressly bar an action at the instance of an

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assignee to a patent who is not registered, but produces the same result, in the absence of a special direction by the Court, by making it impossible for him to prove his title.

The case, however, is not in the same position as it was when the Sheriff-Substitute pronounced his decision, for at the first diet of hearing on the appeal the pursuers craved leave to amend the petition, and they have since lodged a minute of amendment in which they ask to be allowed to amend the petition (1) by altering the instance and conjoining James Alexander Martin with the Handy Washer Syndicate, Limited, as a pursuer for his own right, title, and interest; and (2) by adding an averment that the title of the Handy Washer Syndicate, Limited, as assignees to the letters patent has now been registered. If these amendments are allowed, the action will proceed at the instance of the only two parties who have ever been registered as proprietors of the letters patent referred to in the petition.

The first question is whether the amendment should be allowed. It was argued that the proposed amendment came too late in respect that Martin had ceased to have any title to the letters patent, and that the original defect in the title of the Handy Washer Syndicate could not be cured by conjoining with them as a pursuer in the action a person who had ceased to have any title to or interest in the letters patent. The contention is technical, and in my opinion without real substance. As I have already stated, if the amendment is allowed, the action will proceed at the instance of the only two parties who have ever had any interest or title to the patents in question, and if the action had originally been brought at the instance of these two parties I do not think that any objection to their title to sue could have been stated successfully. That being so, there seems to me to be no good reason why the amendments proposed—which are clearly within the powers of the Court under rule 79 of the first schedule to the Sheriff Courts Act of 1907—should not be allowed. It is not suggested that the defender will be prejudiced in any way, whereas, on the other hand, if the amendments were rejected, the expense of the present proceedings would be thrown away (*Rackstraw* v. *Douglas*, 1919, S.C. 354).

The next question is, on what terms should the amendments be allowed, and I think that full justice will be done to the defender if the pursuers, the Handy Washer Syndicate, are found liable to the defender in expenses from the date on which the record was closed.

As regards the other preliminary pleas stated for the defenders, these have not been dealt with by the Sheriff-Substitute, and were not made the subject of the present appeal. The case will accordingly go back to the Sheriff-

Substitute in order that he may deal with them and proceed as accords. A. O. M. M.

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The defender's complete specification was subsequently accepted by the Patent Office, and as the questions at issue then fell to be determined by the Comptroller of Patents, the Court, on defender's motion, recalled the interim interdict and sisted procedure in the cause.

For pursuers—Mr. W. ROBERTSON (Messrs. Robertson & Stove), Glasgow.
For defender — Mr. J. A. M'MILLAN (Messrs. Wright, Johnston, & Orr), Glasgow.

No. 25.
LANARKSHIRE
Furniture Supply Co., &c. *v* Clark, &c.

THE FURNITURE SUPPLY COMPANY and Partner, *Pursuers;* PETER CLARK and JAMES S. M'ALHONE, *Defenders.*

Vitious intromission—Goods held on hire agreement—Auctioneer selling on instructions of possessor and ostensible owner—Liability to true owner—Carrier—Removal contractor.—Circumstances in which *held* (1) that an auctioneer was liable to the owners for the value of goods sold by him, which were on hire, and which he had sold on the instructions of the party possessing under the hire agreement; but (2) that the removal contractor who had conveyed the goods to the auctioneer's rooms was not liable.

This was an action in the Small Debt Court at Glasgow for delivery of a tapestry square, chesterfield suite, blue mohair rug, pair of panels, and pair of pictures, or alternatively to pay their value, viz. £20.

The facts are fully disclosed in the annexed interlocutor of the Sheriff-Substitute (HARVEY):—

August 29, 1921
Sheriff HARVEY

GLASGOW, 29*th August*, 1921.—It is agreed that the defenders in this case acted in good faith, and the question is, who is to bear the loss which has arisen from the dishonesty of a third party, one Robert Weir, formerly residing at 6a Wellshot Cottages, Cambuslang. The furniture in question was in the possession of Weir in his house at Cambuslang, under a hire agreement between him and the pursuers, dated 24th March, 1919. It is common ground that under this agreement Weir acquired no title to the furniture, and that it did not amount to an agreement to sell. Towards the end of May, 1920, Weir instructed the first called defender, Peter Clark, who is a furniture dealer and removal contractor, to remove the furniture to the auction rooms of the second called defender, James S. M'Alhone, trading as Francis Henry, auctioneer and valuator, Melville Court, 132 Trongate, for sale. The furniture was removed by Clark in pursuance of his instructions from Weir's house

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to Henry's auction rooms on 30th and 31st May, 1921, and on the Friday following was sold by M'Alhone to a purchaser whose name is now disclosed. The furniture sold included all the items specified in the summons, with the exception of the tapestry square, which is not proved to have ever been in possession of either defender. With this exception, the furniture has been delivered to the purchaser, and the proceeds of the sale, less expenses, amounting to £31 1s., has been paid to Weir, whose whereabouts are apparently not now known. At all events, no attempt to recover this money from him seems up to now to have been made.

The question of law for decision is whether in these circumstances (1) Clark and (2) M'Alhone, or either of them, are liable for delivery of the goods, to the true owner, or alternately for payment to him of their value. It is agreed that their value for the purposes of this case, not including the tapestry square, is £19.

The question raised is thus simpler than that dealt with in the cases of *Anderson* v *Croall*, 1903, 6 F. 153; *Helby* v *Matthews*, 1895, A.C. 471; *Marten* v *Whale*, 1917, 2 K.B. 480, and under sec. 25 (2) of the Sale of Goods Act, 1893. These refer to the position of a purchaser from one whose title is defective or limited. Here the question is as to the liability to the owner of a person who sells property without authority from him, for it is admitted that at the time of the sale by auction the pursuers were owners of the furniture, and that M'Alhone had no authority from them to sell. It seems to me clear that if an auctioneer sells goods belonging to another without authority from him he is liable—apart from any question of negligence—to restore the goods to the owner, or if that is impossible, to pay them their value, just as a banker who pays on a forged cheque is liable for the loss (*Colonial Bank of Australasia, Ltd.*, v *Marshall*, 1906, A.C. 559). There is no offer to restore the goods in this case, and no suggestion that such a course would be practicable, and I therefore grant decree against the defender M'Alhone for the sum of £19.

There seems to me to be no valid ground of action against the defender Clark. A carrier is not liable to the owner for the value of stolen goods which he conveys on the instructions of the thief from one place to another.

Decree against defender M'Alhone for £19, with expenses; assoilzies defender Clark, with expenses against pursuers. (Pursuers' expenses against M'Alhone not to include those due by him to Clark). W. H.

For pursuers—Mr. A. W. GEMMILL (Messrs. Manson & Turner MacFarlane), Glasgow.

For defenders—Mr. JOHN HENDERSON (Messrs. Crawford, Herron, & Cameron), Glasgow.

SHERIFF COURT OF LANARKSHIRE.

JOHN HUTCHISON, *Pursuer;* GLASGOW CORPORATION, *Defenders.*

No. 26.
LANARKSHIRE
Hutchison v Glasgow Corporation

Reparation—Neglect of statutory duty—Defective street lighting—Glasgow Police Act, 1886, *secs.* 149 (5) *and* 357.—Municipal corporation *held* liable for damage to a vehicle colliding with an erection in a street, which was not sufficiently lighted so as to be reasonably visible to the driver of the vehicle.

The circumstances of the case are disclosed in the following interlocutor of the Sheriff-Substitute (FYFE):—

Feb. 14, 1921
Sheriff FYFE

GLASGOW, 14*th February*, 1921.—Having heard parties' procurators and considered the proof and productions, finds (1) that in the early hours of the morning of 19th December, 1919, the pursuer's motor car, in charge of his servant, was being driven westwards along Vulcan Street; (2) that in Vulcan Street the defenders have erected a lavatory surrounded by an iron railing, which is in the centre of the street; (3) that under the Glasgow Police Acts it is the defenders' duty to provide efficient lighting in the streets of the city, including Vulcan Street; (4) that the lighting provided on this date was not sufficient to make visible, from the east, the east end of the lavatory railing; (5) that pursuer's driver, being in ignorance that the lavatory was there, owing to the insufficient lighting, collided with the railing; (6) that damage was caused to the car, which cost £76 1s. to repair: Finds in law that the defenders, having failed to discharge their statutory duty to efficiently light Vulcan Street, are liable to the pursuer in reparation for the damage done to his car; therefore decerns against the defenders for payment to the pursuer of £76 1s., with interest thereon at 5 per cent. from this date; finds defenders liable in expenses; allows an account to be given in, and remits to the Auditor for taxation. T. A. FYFE.

Note.—The pursuer's first argument in this case is based upon sec. 149 (5) of the Glasgow Police Act, 1866, which makes liable to a penalty of £5 any person "who leaves without a sufficient light after sunset any area, pit, or sewer of which he has charge." I do not think, however, that the lavatory which was erected in Vulcan Street reasonably comes within this section, which, in my opinion, is intended to apply to some temporary excavation, not to a permanent place like this lavatory. If the defenders are in fault under the 1866 Act, their negligence seems to me rather to fall under sec. 357, which places upon the defenders the general obligation of making provisions for lighting in a suitable manner the streets of the city. I am not laying

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down any general doctrine as to defenders' duty under sec. 357, for no rule of general application can be promulgated in such a matter (*Carpenter* v. *Finsbury Burgh Council*, 1920, 2 K.B.D. 195). What is sufficient lighting of a street must necessarily, in each case, be a question of circumstances, and what the pursuer here has to prove is that, at the particular place where this casualty occurred, there was not light in the street sufficient to enable the pursuer's taxi driver, with reasonable care, to see the railing surrounding the lavatory, and avoid running against it. The place which had to be lighted was the east end of the lavatory opening. It is not of any consequence in the present case that there may have been light which would enable a driver approaching from the west to see the lavatory. The pursuer's driver was approaching it from the east. He says he had never been there before, and that he was unaware of the existence of the lavatory opening. The evidence is somewhat contradictory as regards the carrying power of such lamps as were there, but I think the preponderating weight of testimony establishes that, in the circumstances, the lighting of the street was not sufficient to show up the east end of the lavatory railing, as an obstruction in the centre of the street, right in the path of a vehicle approaching from the east. I offer no opinion upon the question of the necessity for a light being upon the lavatory itself, of which much was said. That may or may not be necessary; or it may or may not be feasible. No question arises in this case about the obligation of defenders to place a light on such a structure; and I have no call to decide whether that is their obligation or not. It is enough, for the disposal of this case, that the defenders' obligation was to so light the street as to make it safe for vehicular traffic coming either way. The conclusion I come to upon the evidence is that, on this occasion, the street was not sufficiently lighted to show up the east end of the lavatory. In the whole circumstances, I think that pursuer is entitled to prevail.

In the course of the proof it incidentally emerged that the car, at the date of the casualty, was registered in the name of Mrs. Annie Hutchison & Sons, but it does not necessarily follow that pursuer was not the owner of the car, as he avers, and depones that he was. His averment of ownership is accepted on record, and defenders do not state a plea of no title to sue. For the purposes of this action he is the owner.

The repair of the car cost £76 1s. (receipts 13 and 14 of process). The pursuer did not hire another car to take its place during the repair. He makes a vague claim for what he calls loss of profit; but even if that is relevant,

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which I doubt, the proof of it is not satisfactory. Pursuer produces no books, and the loss of profit claim really stands only upon his own deposition. I think defenders' liability is only for the £76 1s., the cost of the repair of the car.

T. A. F.

On appeal, the Sheriff (A. O. M. MACKENZIE) adhered in the following interlocutor:—

March 26, 1921

Sheriff MACKENZIE

GLASGOW, 26*th March*, 1921.—The Sheriff, having considered the cause, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute dated 14th February, 1921, complained of, and decerns; finds the defenders liable to the pursuer in the expenses of the appeal; and remits the cause to the Sheriff-Substitute, with power to decern for the expenses now found due. A. O. M. MACKENZIE.

Note.—It is admitted on record that it is the duty of the defenders, under the Glasgow Police Acts, to provide efficient lighting in the streets of the city during the hours of darkness, and the question is whether the lighting they supplied in Vulcan Street in December last was sufficient to show the obstruction caused by the lavatory at the west end of that street. The Sheriff-Substitute has held, on the evidence, that the street was not sufficiently lighted for that purpose, and I agree in the conclusion at which he arrived. While there were two lamps near the lavatory, one on each side of the street, lit on the night in question, it is proved that the lamp on the south side was burning very dimly, and there is some evidence that the lamp on the north side was also rather dull. In the absence of any light above the lavatory, or the fountain to the west of it, the lamps which I have mentioned appear, on the evidence, not to have been sufficient to light up the east end of the lavatory.

It was argued that there was contributory negligence on the part of the driver of the pursuer's taxi-cab, but I am unable, on the evidence, to hold that there is any sufficient proof of contributory negligence.

It was also maintained that the pursuer had failed to prove that the necessary repairs to the car cost the sum claimed by him. I am unable to sustain this contention. The sum which he claims represents the actual amount which he had to pay for the repair of the car, and the contract for the repair was entered into after an estimate had been obtained by the pursuer and checked by a man of skill employed by him.

On the whole matter, therefore, I am of opinion that the appeal falls to be refused. A. O. M. M.

For pursuer—Mr. KENNETH A. BORLAND (Messrs. Borland, King, Shaw, & Co.), Glasgow.

For defenders—Mr. R. J. CAMPBELL for Sir John Lindsay, town-clerk, Glasgow.

No. 27.
Lanarkshire
Brown & Son, Ltd. *v* Caledonian Railway Co.

John Brown & Son, Limited, *Pursuers;* The Caledonian Railway Company, *Defenders.*

Carriage—Railway—Consignment note—Owners' risk rates—"Wilful misconduct"—Contract conditions.—Circumstances in which railway company *held* not liable for loss of goods stolen in transit in respect that the goods had been consigned at owners' risk rates, and the loss was not attributable to "wilful misconduct" on the part of the railway servants.

The interlocutor of the Sheriff-Substitute (Fyfe), which was in the terms following, sufficiently details the facts of this case:—

March 18, 1921
Sheriff Fyfe

Glasgow, 18*th March*, 1921.—Having heard parties' procurators and considered the cause, finds (1) that pursuers are muslin manufacturers in Glasgow; (2) that they had, on the basis of prices ruling at the date of delivery, sold to Style & Gerrish, of Salisbury, the goods described in invoices (5/1 and 5/2 of process); (3) that they had sold to Seccombes, Limited, of Cardiff, the goods described in invoice (No. 5/4 of process); (4) that these goods when ready for delivery were packed in parcels, and, along with a number of other parcels, were on the forenoon of Saturday, 27th March, 1920, delivered to defenders for conveyance to their destination; (5) that they were consigned to defenders for carriage at reduced rates upon the terms of consignment note (No. 5/7 of process), which, *inter alia*, provided that defenders should not be liable for loss, damage, misdelivery, delay, or detention "except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants"; (6) that the pursuers' parcels, twenty-seven in number in all, were handed to defenders at their Dalmarnock Road station on the up-platform; (7) that servants of defenders about 12.30 took them across to the down-platform, and placed them on a barrow ready to be entrained on a train due to come in at the down-platform at 12.45; (8) that, before the train came in, the two parcels in question were stolen from the barrow; (9) that the thief was traced, and tried, and convicted, but the parcels were not recovered; (10) that pursuers had to repeat the orders to their two customers, but, by the time they were able to do so, prices had risen considerably; (11) that pursuers have failed to prove that the loss of the parcels was owing to wilful misconduct on the part of defenders' servants: Finds in law that the loss claimed for not having arisen from wilful misconduct on the part of defenders' servants, the defenders are not liable therefor; therefore assoilzies defenders; and finds them

entitled to expenses; allows an account to be given in, and remits to the Auditor for taxation. T. A. FYFE.

Note.—On Saturday, 27th March, 1920, about 11.30 a.m., pursuers delivered to defenders, at their Dalmarnock Road station, Glasgow, twenty-seven parcels, addressed to various customers, including the two parcels in question in this case. These were handed in at defenders' parcel office, which is on the up-side of the line. Two boys, servants of defenders, were instructed to take them across to the down-platform, and to put them into a train coming in there at 12.45. The boys took the parcels to the down-platform, and piled them on a barrow to await the train which was due in about a quarter of an hour. Meantime a train had come in at the up-platform, and the boys, in the ordinary course of station work, went across to assist in the despatch of that train. They were away about five minutes, and when they returned to the down-platform to attend to the train due at 12.45, on which the parcels were to be shipped, they found that two of the twenty-seven parcels had been stolen. These were the parcels which are claimed for in this action. The thief was found, and was punished, but the parcels were not recovered. The pursuers had, of course, to repeat the orders to their customers at their contracted prices, but, whilst the repeat orders were being got ready, prices rose, and pursuers now claim for their enhanced value when they shipped them for the second time. This I do not think they are entitled to do. If defenders are liable at all, they are only liable for the value of the parcels at 27th February, 1920, but, in the view I take, the amount of pursuers' loss is of no consequence, for I do not think that defenders are liable for that loss at all.

The defenders have two alternative rates for carriage of merchandise—at the consignor's option—one the ordinary rate, when the railway company take the ordinary liabilities of common carriers; the other a special or reduced rate, when the consignor relieves the company of any claim for loss, unless it arises from "wilful misconduct on the part of the company's servants." Pursuers consign goods frequently by defenders' railway, and they elected to send them at the reduced rate, which, on pursuers' traffic over a year, represents about £500 less than ordinary rates would represent, so that it is worth pursuers' while to exercise their option in favour of the reduced rate. They did exercise their option, and the parcels were consigned at the reduced rate, or, as it is commonly termed, were consigned for carriage at owners' risk.

The sole question in this case accordingly is, were the parcels lost owing to "wilful misconduct" on the part of defenders'

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servants. Now, wilful misconduct is something more than mere negligence, which is the neglect of a duty (*Bastable* v. *N.B.R. Company*, 1912, S.C. 555). It must be established that a duty exists before there can even be negligence; and even if there is negligence, that is not necessarily "wilful misconduct" within the meaning of the consignment note (No. 5/7 of process); for, to bring it up to the standard of wilful misconduct, negligence must be more than mere carelessness, or mere forgetfulness, or mere overlooking of something which with more vigilance would not have been overlooked, or mere error of judgment. It must be gross culpable negligence (*G.W. Railway* v. *Glenister*, 1873, 29 L.T.R. 423). Every act of even misconduct on the part of a railway servant is not necessarily wilful misconduct. There are many grades of carelessness, or negligence, or misconduct, possible on the part of railway servants, any of which may cause loss to customers of the railway, and this I take to be just the reason for the introduction of the word 'wilful' into the contract for carriage at owners' risk rates. It is inserted in order to make clear to a consignor, who elects to send his merchandise at the reduced rate, that he is not to have the benefit of the lower rate and also to hold the railway company responsible for any conceivable foolishness or carelessness on the part of the railway servants. The reduction in the rate is the *quid pro quo* for the railway company being freed of responsibility, except for something different from ordinary negligence. Wilful misconduct infers some act of omission or commission in which the will has been exercised (*Lewis* v. *G.W. Railway Company*, 1877, 3 Q.B.D. 195) in deciding to leave undischarged some plain duty.

Now, in the present case, what was the duty of defenders in regard to these parcels? It was, I think, to put them on a train and send them to the consignees whose name they bore. I do not think it included the police duty of preventing crime, and that is really the duty which pursuers here seek to fasten upon the defenders. What was done with these parcels was what is daily being done at any railway station—packages are placed upon a barrow, and the barrow set upon a spot on the platform which, when the train comes in, will bring the barrow opposite, or near to, the luggage van into which the packages are to be put. I think that the duty of the railway servants includes such things as handling packages with care, and probably, if they are in the open and of a nature to require protection from weather conditions, taking reasonable precautions for their protection. But it would be a very serious addition to the responsibility of a railway company carrying goods at owners' risk rates if the failure of their servants to think of the possibility of thieves

being about were to be regarded as wilful misconduct. That would be making the railway company insurers against burglary, and such an insurance cover is not an obligation within the contract constituted by the consignment note (No. 5/7).

An example of the kind of gross carelessness which amounts to wilful misconduct is the negligence of the railway official in the case of *Bastable*. The official had to send out a truck-load of material, piled high above the sides of the truck. There was a gauge provided, under which if a load would pass, it was safe to pass under bridges on the line. There was an express direction that loads were to be passed under this gauge. But the railway official, in breach of this express duty, willed not to exercise this precaution, although he ought to have appreciated that thus exercising his will not to do the duty plainly before him might lead to the event which happened. Accordingly, his deliberate disregard of a known duty, reckless of the possible consequences, was held to be wilful misconduct.

A recent case (*The Norseland Canning Company, Limited* v. *The Highland Railway Company*, 1919) illustrates the difference between negligence, or error in judgment, and wilful misconduct. Goods missed a market by being sent in the second portion of a train. In that case there was no specific duty existent to send the merchandise by the first portion of a divided train rather than by the second portion, and there was no exercise of will to the effect of disregarding a plain duty. What was done was what had been in use to be done. It was held that there was no case of wilful misconduct.

No one case can exactly rule another. Each case must depend upon its own circumstances, and, in the circumstances of the present case I do not think that there is disclosed any duty resting upon the defenders which their servants deliberately willed not to discharge. In my opinion, pursuers have not proved wilful misconduct on the part of defenders' servants causing loss to pursuers. The onus of proof is upon pursuers, and, as they have not discharged it, the defenders are entitled to decree of absolvitor. T. A. F.

On appeal, the Sheriff (A. O. M. MACKENZIE) adhered in the following interlocutor:—

May 20, 1921

Sheriff MACKENZIE

GLASGOW, 20*th May*, 1921.—The Sheriff, having considered the cause, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute dated 18th March, 1921, complained of, and decerns; finds the pursuers liable to the defenders in the expenses of the appeal; and remits the cause

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to the Sheriff-Substitute, with power to decern for the expenses now found due. A. O. M. Mackenzie.

Note.—I have had some difficulty in this case, but am not prepared to differ from the conclusion at which the learned Sheriff-Substitute arrived. At the same time, I am not prepared to agree with what apparently was his view, that there is no duty on a railway company to take precautions against the theft of articles delivered to them for carriage. In my opinion, there is an obligation on the railway company to take reasonable care for the protection of goods entrusted to them against theft as against other risks, and that duty was, I think, the more incumbent upon the defenders in the present case, because, according to the evidence of the stationmaster, Tinning, the staff at Dalmarnock station had been specially warned with regard to the risk of theft. The question on which I have had difficulty is whether the boy Haddow was guilty of wilful misconduct in leaving the barrow-load of parcels on the down-platform in order to attend to the train which came into the up-platform. He admits that he had been instructed to look after parcels, and that he knew it was his duty to look after them, in case any one should steal them, but he says that it did not occur to him that there was any risk of the parcels being stolen if he left them on the down-platform while he went to the other platform to attend to the train. His conduct, in my opinion, clearly was negligent, but wilful misconduct is, if not a different thing from negligence, at all events, negligence of a high degree. In the case of *Bastable*, 1912, S.C. 555, Lord President Dunedin expressed the opinion (p. 565) that there was no difference in quality but only of degree between negligence and wilful misconduct, but this opinion has not met with universal acceptance in Scotland—per Lord Johnston in *Bastable*, p. 562, and per Lord Salvesen in the unreported case of *The Norseland Canning Company* v. *Highland Railway Company*, and the Courts of England and Ireland have been inclined to draw a distinction between negligence and an act or omission amounting to wilful misconduct, in respect that wilful misconduct involves an intentional breach of duty knowingly committed without regard to the consequences (*Graham* v. *Belfast and Northern Counties Railway Company*, 2 I.R. 13; *Lewis* v. *Great Western Railway Company*, L.R. 3 Q.B.D. 195; *Forder* v. *Great Western Railway Company*, 1905, 2 K.B. 532). In the present case, on a consideration of the whole circumstances, I am not prepared to hold that the conduct of the boy Haddow in temporarily leaving the parcels unattended which were under his charge on the down-platform was negli-

gence of so gross a character as to amount to wilful misconduct, or to regard it as a breach of duty deliberately and recklessly committed without regard to the consequences.

For these reasons I am of opinion that the appeal fails.

A. O. M. M.

For pursuers—Mr. J. S. MUIRHEAD (Messrs. Baird Smiths, Muirhead, & Guthrie Smith), Glasgow.
For defenders—Mr. A. MACPHAIL, Glasgow.

No. 28.

THE CLYDESDALE MOTOR TRANSPORT COMPANY, *Pursuers;* M'COSH & DEVINE, *Defenders.*

Registration of Business Names Act—Action for repayment of contract price—Personal bar—Relief—Distinction between enforcing and rescinding a contract.—Held that the power of the Sheriff to grant relief from disability under sec. 8 of the Registration of Business Names Act, 1916, is limited to actions for enforcing contracts, and that in the present case, as the claim involved rescission of the contract, relief could only be granted by the Court of Session, and action sisted to permit of application for such relief being made.

This was an action to rescind a contract for the purchase of a motor lorry and for repayment of the price thereof. The defenders' first plea in law was to the effect that the pursuers were meantime barred from proceeding with the action, as they had not registered under the Registration of Business Names Act. The defenders further contended that said Act restricted the Sheriff's power of relief to actions raised for enforcing a contract, and not to an action such as this for rescinding a contract. The interlocutor issued by the Sheriff-Substitute (LYELL) is given below. The following are the statutory provisions which are therein referred to:—

Sec. VIII.—*Disability of Persons in Default.*—(1) Where any firm or person by this Act required to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise:

Provided always as follows:—

(*a*) The defaulter may apply to the Court for relief

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against the disability imposed by this section, and the Court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts, on condition of the costs of the application being paid by the defaulter, unless the Court otherwise orders, and on such other conditions (if any) as the Court may impose, but such relief shall not be granted except on such service and such publication of notice of the application as the Court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the Court that, if this Act had been complied with, he would not have entered into the contract.

(*b*) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid.

(*c*) If any action or proceeding shall be commenced by any other party against the defaulter to enforce the rights of such party in respect of such contract, nothing herein contained shall preclude the defaulter from enforcing in that action or proceeding by way of counterclaim, set-off or otherwise, such rights as he may have against that party in respect of such contract.

(2) In this section the expression "Court" means the "High Court" or a judge thereof:

Provided that, without prejudice to the power of the High Court or a judge thereof to grant such relief as aforesaid, if any proceeding to enforce any contract is commenced by a defaulter in a County Court, the County Court may, as respects that contract, grant such relief as aforesaid.

Sec. XXIII.—*Application to Scotland.*—In the application of this Act to Scotland, "Court of Session" shall be substituted for "High Court," "Sheriff Court" shall be substituted for "County Court."

July 25, 1921

Sheriff Lyell

Glasgow, *25th July*, 1921.—Closes the record, and having heard parties' procurators thereon, in respect that it is admitted that this action has been raised to vindicate rights alleged to have arisen to the pursuers out of a contract made while the pursuers as a firm were carrying on business in contravention of the Act 6 & 7 George V. cap. 58,

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sists procedure herein that the pursuers may make application for relief against the disability imposed by the 8th section of the said Act. WILL. DARLING LYELL.

Note.—It is quite obvious that the pursuers may not proceed with this action until they have obtained relief from the disability imposed by the Act. The power of the County Court—which is interpreted as the Sheriff Court in Scotland—seems to be limited to granting relief only as to the contract, the subject-matter of the action (sec. 8 (2) proviso), and further, that the action must be one for "enforcing" that contract. As at present advised, I do not think this action, which is one not for enforcing but for rescinding a contract, comes within the ambit of that sub-section. It is therefore for the pursuers to consider whether they must not now apply to the Court of Session under sec. 8 (*a*). I am not much moved by the consideration of hardship, where a firm has confessedly been in default since January, 1920, and has carried on business in defiance of a statute passed in 1916. W. D. L.

The pursuers applied to the Court of Session and obtained relief under sec. 8 (*a*).

For pursuers—Mr. J. TURNER MACFARLANE (Messrs. Manson & Turner MacFarlane), Glasgow.

For defenders—Mr. J. A. M'MILLAN (Messrs. Wright, Johnston, & Orr), Glasgow.

SHERIFF COURT OF PERTHSHIRE.

No. 29.

PERTHSHIRE
Carnegie v Brown

JAMES CARNEGIE, *Pursuer;* WILLIAM BROWN, *Defender.*

Contract—Breach—Stipulated payment—Penalty—Liquidated damages.—One of the conditions in a contract for sale of standing timber provided for certain payments to the seller in the event of the purchaser not clearing the ground by a specified date. *Held* that these payments were of a penal nature, and not an agreed assessment of damages.

James Carnegie, of Stronvar, raised this action against William Brown, timber merchant, Crieff, for payment of £222, being (1) sum stipulated under agreement between the parties for sale of growing timber on pursuer's estate, to be paid to pursuer in the event of defender failing to have the timber removed by a certain date, £150; (2) damage done by defender to pursuer's roads and ways, £48, which damage the defender was by said agreement bound to repair; and (3) for failure by defender to destroy brushwood as stipulated in second agreement, £24. The contract of sale was in the standard form supplied by the Landowners' Co-operative Society, Limited, and the clause

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under which pursuer claimed the said sum of £150 is quoted in the interlocutor (*infra*) of the Sheriff (Sandeman). The interlocutor of the Sheriff-Substitute (Boswell) was as follows:—

April 18, 1921
Sheriff Boswell

Perth, 18*th April*, 1921.—The Sheriff-Substitute, having considered the cause, appoints the pursuer within twenty-one days to specify by minute (1) the nature, and, so far as reasonably possible, the amount of the damage actually sustained by him through the defender's alleged breach of contract in failing to remove timber by 10th June, 1919; and (2) the items of which the sum of £48 mentioned in condescendence 4 is made up, and how much of that sum represents the cost of roads repaired by the pursuer, and continues the cause. C. P. Boswell.

Note.—On construction of article 3 of the conditions of sale, I have come to think that the sum of £30 per month there mentioned is a penalty and not liquidate damages. The question always is in such cases whether the sum is proportionate or not. Now, here it is proportionate as to time, but not as to events. Suppose a single tree was left, could the sum be claimed at the end of the month? I think not; but, if not, then the sum is a penalty and not liquidate damages.

The sum being a penalty, the law is that the penalty represents the damages unless and until the contrary is proved. That is my reading of *Craig* v. *M'Beath*, 1863, 1 M. 1020. No specification was needed there, because issues were adjusted for jury trial. Here I think the defender is entitled to some information as to what the heads of damage are.

If this interlocutor is complied with, the next step would be a proof from which, however, I should exclude answer 3 as irrelevant in respect it seeks to contradict a written contract by extraneous communings. C. P. B.

An appeal to the Sheriff was taken, but before judgment in the appeal was issued the pursuer lodged a minute of amendment proposing to add after the words "or £150" in condescendence 3 the words "which sum of £150 the pursuer claims as damages from the defender under this head," and the words "as damages in terms of said agreement" after the words "is liable to the pursuer" occurring in condescendence 4. Thereafter the subjoined interlocutor was issued by the Sheriff:—

July 6, 1921
Sheriff Sandeman

Perth, 6*th July*, 1921.—The Sheriff, having heard parties and considered the cause, recalls the interlocutor of the Sheriff-Substitute dated 18th April, 1921, and dismisses the

cause; finds the pursuer liable to the defender in expenses; allows an account to be given in, and remits to the Auditor to tax; and remits to the Sheriff-Substitute.

CONDIE SANDEMAN.

Note.—At the hearing of the cause I gave the pursuer an opportunity of amending his record to let him aver that he had suffered damage. He has declined to avail himself of the opportunity, and has merely proposed an amendment to the effect that he sues for £150 "as damages." The pursuer had already been directed by the learned Sheriff-Substitute to aver his claim with specification. From these circumstances I gather that the pursuer is unable to specify what damage he has suffered and rests his case on the proposition that the £30 a month set out in the agreement is pactional damages. On this question I agree with the learned Sheriff-Substitute.

In October, 1918, the defender bought from the pursuer timber on the estate of Stronvar, which grew on some 6 acres. In terms of the conditions of sale he bound himself to have the timber removed from the ground by the 10th of June. The third clause provides—"In the event of the purchaser not removing the timber sold and clearing the ground as aforesaid by the said date he shall pay to the seller the sum of £30 for each month or part thereof after 10th June, 1919, during which any part of his purchase, together with any appliances or erections and brushwood remains on the estate; such payments to be made to the seller at the end of each month after said date of expiry; and, further, the seller reserves the right, should he prefer to do so, to oblige the purchaser to forfeit all trees included in the sale left on the ground after the date agreed for the completion of the contract, and he will be entitled to deal with the same as he may think fit."

This clause, in my opinion, has all the indicia of a penalty clause and in no way resembles a clause intended to assess damages. It is exorbitant in amount, because it stipulates for £30 a month for land that was (the pursuer admitted it) worth about 6s. an acre per annum. The £30 is payable equally for a month or for a few days' delay; it is equally made payable whether all the trees are on the ground or only one. It is made payable even though all the timber has been removed and there remains any appliance or erection or even brushwood. I may refer to *Lord Elphinstone* v. *Monkland Iron and Coal Company*, 1886, 13 R. (H.L.) 99; *Clydebank Engineering and Shipbuilding Company* v. *"Castaneda,"* 1904, 7 F. (H.L.) 77; *Dingwall* v. *Burnett*, 1912, S.C. 1097.

Agreeing, as I do, with the learned Sheriff-Substitute, I

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should have adhered to his interlocutor had it not been for the attitude taken up by the pursuer in his minute of amendment. After ample opportunity, with the note of the learned Sheriff-Substitute before him, he prefers to adhere to his view that he is entitled to recover the sum sued for as liquidated damages. Accordingly, I propose to dismiss the action as irrelevant. C. S.

For pursuer—Messrs. Jameson & Mackay, Perth.
For defender—Messrs. S. Graham Mickel & Co., Crieff.

SHERIFF COURT OF MIDLOTHIAN.

No. 30.
Midlothian
Tod & Sons, Ltd. *v* Sinclair

John Tod & Sons, Limited, *Pursuers;* Adam W. Sinclair, *Defender.*

Expenses—Removing—Rent £30—*Scale—Rent Restriction Act.*—In ordinary removings the scale of taxation of expenses is determined by the amount of the rent and the restrictions which are placed by the Increase of Rent, &c. (Restrictions) Act on a landlord recovering possession at the termination of a let do not, *quoad* expenses, make an action of removing then instituted an extraordinary removing.

This was an action craving the Court to ordain the defender to remove from a dwelling-house, of which the annual rent was £30, at a term of Whitsunday, under pain of ejection. Defences were lodged, and the defender ultimately obtained judgment in the Sheriff Court on the ground of want of suitable alternative accommodation, and was found entitled to expenses. An appeal was taken by pursuers to the Court of Session, but an arrangement was come to under which the defender was ordained to remove at a future term of Whitsunday, and he was found entitled to expenses. The auditor taxed the defender's account of expenses on the higher scale, and the pursuers lodged a note of objections, their contention being that the action was an "ordinary removing" from a house of an annual rent of £30, and that the account should therefore be taxed on the lower scale in terms of C.A.S. M. ii. 4. The defender contended, *inter alia*, that on account of the provisions of the Rent Restriction Act the action was an "extraordinary removing," and that the account was properly taxed on the higher scale. The defender had other arguments in favour of the higher scale being allowed, and these are noted in the subjoined interlocutors. The pursuers further objected to the defender being allowed the ordinary fees for copy-

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ing the proof in the case on the ground that it had not been copied by his agent in his own office, but had been copied at a less cost by a typewriting office. In disposing of the matter the Sheriff-Substitute (ORR) and the Sheriff (CROLE) issued the following judgments:—

Nov. 28, 1921

Sheriff ORR

EDINBURGH, 28*th November*, 1921.—The Sheriff-Substitute, having considered the report of the Auditor of Court taxing the defender's account of expenses of process (No. 43 of process), and the note of objections thereto by the pursuers (No. 44 of process), and having heard parties' procurators on said report and objections, sustains the first objection stated, and remits to the Auditor of Court of new to tax the said account according to scale 1 of the Table of Fees; repels the second objection stated to the extent of allowing the item objected to according to scale 1.

R. L. ORR.

Note.—The house from which pursuers sought to remove defender was occupied by him as a yearly tenant from Whitsunday to Whitsunday. They duly warned him to remove at Whitsunday, 1918. The action is therefore, in my opinion, an ordinary removing, that is to say, a removing at the natural termination of the lease or tenancy.

C.A.S. M. chap. ii. (4), explicitly provides that in ordinary removings the scale of expenses shall be determined by the amount of the rent per annum. When the rent is not set forth as exceeding £50 the charges shall be according to scale 1. The rent in this case is £30 a year.

But it is said this action must be regarded as an extraordinary removing, *i.e.*, a removing at some period of the endurance of the lease and founded on some legal or conventional irritancy. This contention is based on the terms of the Rent Act which, it is said, gives the tenant a right to sit still unless one or other of the conditions set forth in the Act is fulfilled. In my opinion that argument is unsound. The lease here was still a yearly lease expiring at Whitsunday. The tenant was entitled to give notice to the landlord previous to any Whitsunday term in the manner prescribed by the Sheriff Courts Act, 1907, that he intended to leave, and, having given such notice, he was entitled to leave at Whitsunday, just because the natural termination of the lease or tenancy had arrived. The provisions of the Rent Act did not alter the ish.

Similarly the landlord was entitled to give notice of termination at any Whitsunday on the same ground. The restrictions on his right to recover possession introduced by the Act did not alter the fact that the natural termination of the lease or tenancy arrived at Whitsunday.

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Further, it was argued that the matter was concluded by agreement of parties and reference was made to the joint minute and interlocutor and docquet. It was argued that taxation by consent was final and could not now be disturbed.

In my opinion these documents do not affect the question. Pursuers were to be liable in judicial expenses as the same might be taxed. That meant simply, as the same might be taxed on the scale appropriate to the cause. That has not, in my opinion, yet been done.

The objection to the item of £7 19s. for making a copy of the proof is not well founded. I think the Auditor has treated this matter correctly.

R. L. O.

Dec. 30, 1921

Sheriff Crole

Edinburgh, 30*th December*, 1921.—The Sheriff, having heard parties' procurators and having considered the cause, adheres to the interlocutor of the Sheriff-Substitute appealed against, and dismisses the appeal; finds no expenses due to or by either party in the appeal, and remits the cause to the Sheriff-Substitute.

G. L. Crole.

Note.—The first objection to the Auditor's taxation of the defender's account of expenses is that he has taxed it under scale 2 whereas it should have been taxed under scale 1. I agree with the Sheriff-Substitute that this objection ought to be sustained. In my opinion the action was an ordinary removing, and as the rent was under £50 per annum, the scale of expenses applicable was scale 1 (C.A.S.M. chap. ii. (4)). The defender contended that the action should be regarded as an extraordinary removing, as the Rent Restrictions Act gave the tenant the right of continuing his tenancy till the expiry of the Act at Whitsunday, 1923, and that, therefore, the action was of the nature of a declarator of irritancy. I do not think this contention is well founded. The natural termination of the lease was Whitsunday, 1918, and the Rent Restrictions Act did not alter this fact. That Act merely had the effect of giving the tenant the privilege of stating certain defences to an action of removing or ejection.

The defender also contended that under the interlocutor of the Court of Session of 20th October, 1921, the Sheriff had no power to do more than decern for the amount of expenses as taxed by the Auditor of the Court of Session, but, however that may be, the expenses referred to in the interlocutor of the Court of Session were included in the account remitted by the interlocutor of the Sheriff-Substitute dated 22nd October, 1921, to the Auditor of this Court, and

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of consent of the parties taxed by him. On 15th November, 1921, the Auditor duly reported the result of his taxation to the Sheriff-Substitute and thereafter the note of objections was lodged by the pursuers. I have no doubt that the Sheriff-Substitute had full power to consider and deal with these objections.

The defender further contended that the Court could now find that the cause was of such importance that the expenses should be taxed on the higher scale. The Court might have so found at the time of pronouncing judgment and before the account was taxed, but it is now too late to make any such finding (*Mickle* v. *M'Coard*, 1913, S.C. p. 1036).

The second objection for the pursuers was not insisted in.

G. L. C.

For pursuers—Mr. A. H. M'LEAN (Messrs. Robson, M'Lean, & Paterson), Edinburgh.
For defender—Mr. R. D. C. M'KECHNIE, Edinburgh.

No. 31.
MIDLOTHIAN
Paden v Paden

Poor Mrs. ELIZABETH M'CANN or PADEN, *Pursuer*; MICHAEL PADEN, *Defender*.

Husband and wife—Adherence and aliment—Offer by husband to provide home for wife—Accommodation in house of husband's mother.—Circumstances in which *held* that the offer by a husband to provide as a home for his wife and child, accommodation in his mother's house consisting of a single room of which the spouses would have sole occupancy was sufficient and should be accepted by the wife.

The judgment of the Sheriff-Substitute (NEISH) in this case is contained in the following interlocutor:—

Dec. 8, 1921
Sheriff NEISH

EDINBURGH, *8th December*, 1921.—The Sheriff-Substitute, having heard the agents for the parties, and considered the proof, productions and whole cause, finds in fact (1) that the pursuer and defender were married to each other on 4th September, 1915; (2) that there is one child of the marriage, Michael Paden, who was born on 23rd December, 1915, and resides with the pursuer; (3) that the pursuer and defender have, for some years, been living apart; (4) that the defender has offered to provide accommodation for the pursuer and to live with her in a room in his mother's house of which the pursuer and defender will have the sole occupancy; (5) that both the pursuer and defender have tried to find other accommodation and have failed to do so; finds in fact and in law that the pursuer is bound to accept said offer: Finds in law that the pursuer is not entitled to decree of adherence and aliment against the defender; therefore assoilzies the defender from the crave of the initial writ and decerns; refuses *in hoc statu* the

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defender's application for the custody of the child of the marriage; finds the defender liable to the pursuer in the expenses of process, allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report.

E. W. Neish.

Note.—There has been a very long proof in this case and much of it is in my judgment irrelevant.

The issue is a simple one, though I do not say that it is easy of decision. It is whether the pursuer is bound to accept the accommodation, which the defender offers her, of a single room in his mother's house? That question, I think, depends for its solution on two considerations (1) whether the accommodation is adequate and suitable; and (2) whether the offer is in *bona fide*.

The parties were married in 1915 when the defender was already in the Army. He served throughout the war, apparently with little leave, and was not demobilised till 22nd March, 1919, so that during this period at any rate he had little opportunity of cohabiting with the pursuer.

The quarrel, and it appears to be the only quarrel which led to the estrangement of the parties, arose in 1916. The pursuer had been working and saving money, and in October, 1916, took and furnished a one-roomed house in Waverley Buildings, Edinburgh, no doubt with the very best intention of providing a home for her husband and herself when he could join her. The defender, who was in hospital at the time, appears to have disliked the locality in which the pursuer had taken her house as being too rough for a young girl, and to have preferred that she should continue saving her money till the war was over. The defender wrote the letter (No. 13 of process) to the pursuer but the terms of the letter do not appear to me to be unduly harsh. The pursuer replied with a not very temperate letter (No. 15 of process). The defender got leave and stayed with the pursuer in the house. He then seems to have quite changed his mind and approved of the house. He says he told the pursuer so, and that he told her to keep the house; but this conversation is not put to the pursuer. Apparently as the result of this foolish tiff the parties drifted apart, and the breach was probably aggravated by the fact that the defender was in the Army till he was demobilised in March, 1919.

The pursuer says the defender was often in Edinburgh during these years and purposely avoided her. The defender denies these allegations, and much of the proof is taken up with evidence on one side or the other. I do not think this matter is of much importance. Almost certainly I should

say there was stiffness on both sides as regards a reconciliation. The pursuer did not write to the defender after October, 1917; on the other hand, I am quite sure the defender could have discovered where the pursuer lived after she had removed to Dumbiedykes Road.

I think the accommodation now offered by the defender is suitable and adequate. True it is that the room offered is in his mother's house and she does not seem to be a very conciliatory person; but defender and his wife will have the sole occupancy of the room, and the mother will have two rooms left for herself and her family. Both pursuer and defender have tried to procure other accommodation and have failed. The defender does not intend that the accommodation now offered should be permanent, if he can get another house.

As regards the *bona fides* of the defender's offer, it is true that the offer was not made until the pursuer applied for admission to the poor roll; but I think, as I have said already, that the pursuer must bear some share of the blame for the estrangement, and I see no reason to suppose that the offer now made is not genuine. I therefore think that the pursuer is bound to accept the defender's offer.

The defender in his answers asks for the custody of the child of the marriage, a boy aged now nearly six, who has been throughout in the custody of his mother. I am not disposed to take the child out of the custody of the pursuer at this stage. The only reference made by the defender to his application is at the end of his examination-in-chief. He has been content to leave the child with the pursuer from his birth, without, I fear, taking much interest in his upbringing, probably because he knew that the child was being well cared for, and until this action was threatened he has contributed nothing towards the child's support. It will, of course, still be open to the defender to ask for the custody of his child in a substantive action, but I sincerely hope that the occasion for such an application will not arise.

I think that this is a case where the pursuer should have her expenses if only because the offer of accommodation was made at such a late hour.

E. W. N.

For pursuer—Mr. LINDSAY C. STEELE, Edinburgh.
For defender—Mr. FERGUSON SHINIE, Edinburgh.

SHERIFF COURT OF LANARKSHIRE.

No. 32.
Lanarkshire
Love *v* Aitken

William Henderson Love, *Pursuer;* Robert Chambers Aitken, *Defender.*

Contract—Agreement to take shares in proposed company—Mutual stipulations—Failure of consideration—Frustration—Power to resile.—Held that an intending subscriber who had offered to the promoter of an intended limited company to take shares in the prospective company and had paid a sum to account was entitled to repayment of that sum because (1) he had resiled before shares had been allotted to him; and (2) the contract had been frustrated because the company had no unallotted shares to allot to him. *Observed*—"An application for shares is no more than an offer which can be resiled from up to the moment of acceptance, and in the case of a limited company there is only one form of acceptance recognised by law, namely, an allotment note."

Aitken, a picture house proprietor, proposed to register a limited company to take over the picture house. Love agreed to take 250 shares, and paid £200 to account. Before a company was registered he changed his mind, and demanded repayment of that sum, and subsequently raised this action to enforce recovery. A company having ultimately been registered, the whole of the shares in which were allotted to Aitken, he offered on record to transfer 250 shares to Love. The Sheriff-Substitute (Fyfe) pronounced the following interlocutor:—

Feb. 14, 1922
Sheriff Fyfe

Glasgow, 14*th February*, 1922.—Having considered the cause, finds (1) that in August, 1921, the defender, in conversations with pursuer, represented to pursuer that he was the proprietor of La Scala Picture House in Cupar-Fife, which he intended to transfer to a limited company about to be formed; (2) that defender suggested to pursuer that he should subscribe for 250 shares in the proposed limited company, and that, upon his doing so, defender would get him appointed salaried supervisor of the picture house at Cupar, and also of another picture house at Monifieth; (3) that, upon these representations of defender, the pursuer acceded to the suggestion that he should take an interest in the prospective limited company, the £250 to be paid in three instalments of £150, £50, and £50; (4) that pursuer on 2nd September, 1921, paid to defender £150, and obtained from him a receipt (No. 7/1 of process) "for part payment of 250 fully paid £1 shares in the La Scala, Cupar-Fife, which company is to be registered"; (5) that pursuer on

1st October, 1921, paid defender a further sum of £50, and obtained from him a receipt (No. 7/2 of process) "being second instalment for shares purchased in La Scala, Cupar-Fife"; (6) that in September, 1921, defender entered into an agreement (No. 7/3 of process) with William Temple Liddell, on behalf of a limited company proposed to be formed, to acquire the La Scala Picture House, Cupar-Fife, the purchase price to be payable entirely in shares of the limited company; (7) that on 21st October, 1921, pursuer, through his law agents, demanded repayment from defender of said £200, but defender declined, and still declines, to make repayment; (8) that at 21st October, 1921, no limited company had been registered; (9) that on 3rd November, 1921, a limited company was incorporated (see No. 9/3 of process) to adopt the agreement (No. 7/3 of process), and to acquire the business of the La Scala Picture House, Cupar-Fife; (10) that the share capital of said company was £5000; (1) that the whole of the shares have been allotted to defender; (12) that, in the event of the pursuer being found entitled to repayment of the £200, the pursuer agrees to decree therefor being granted under deduction of the sum of £16 13s. 4d. counter claimed for by defender: Finds in law that pursuer, having been entitled to resile from the proposed arrangement that he should take 250 shares in the prospective limited company, and, having demanded repayment of the £200 he had advanced before a limited company was incorporated, and defender having refused to repay the same, the pursuer is now entitled to decree as craved, under deduction of the counter claim; therefore decerns as craved for payment of £200, under deduction of £16 13s. 4d., with interest as craved; finds defender liable in expenses; allows an account to be given in, and remits to the Auditor for taxation. T. A. FYFE.

Note.—The facts in this case are not really in dispute, and parties' agents have very wisely put in a minute of admissions, and renounced oral probation. The only fact which is not expressly admitted in the minute is that the shares of the limited company have been wholly allotted to defender. But that is averred in condescendence 5, and it is not denied on record, and so, under Sheriff Court rule 44, it becomes a fact in the case, and now forms finding in fact No. 11.

It is quite clear that shares in the limited company cannot now be allotted by the company to pursuer. What defender offers to do is, upon payment of an additional £50 by pursuer, to transfer to him 250 shares from his own registered holding. But this is, I think, a quite hopeless suggestion, for the pursuer never contemplated accepting a transfer

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of shares from anybody. What alone he contemplated, when he paid defender £200, was an original allotment to him, by the company, of 250 shares, which is a very different thing from a transfer of shares. In the case of allotment, the subscriber's money goes into the coffers of the company. In the case of a transfer the transferee's money goes into the private purse of the transferor.

Even assuming that the verbal communings of August, 1921, amounted to a mutual contract, binding the pursuer to take up shares which might be allotted to him by the limited company when formed (which I do not think was the case); and even assuming that the company had been registered before pursuer asked repayment of his money (which was not the case); I think pursuer's case here would have been established by the single fact that all the shares have been allotted to defender, and there are none available for allotment to pursuer. The contract has been frustrated, and the defender is bound to restore the position by repaying the money given him for a specific purpose, now impossible of fulfilment.

Assuming the existence of a mutual contract, the consideration for the payment of £250 was not that pursuer should become a shareholder in the company as a transferee, but that he should become a shareholder as an allottee; and that consideration failed. In the case of *Watson* v. *Shankland*, 1871, 10 Macph. 124, Lord President Inglis said, "There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this, that, if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration."

That doctrine has received effect in many cases since 1871. Amongst others, I would refer to *Semple* v. *Wilson*, 1889, 16 R. 790, where, out of a growing crop of potatoes, a merchant had bought 60 tons in November, for delivery up to 1st March, and had prepaid the price of £120 by cheque. The potatoes were not delivered as stipulated, and the merchant sued for return of his cheque, or alternatively for £120. The Court found that the merchant was entitled to repayment of the £120, delivery of the potatoes being the consideration upon which the cheque had been granted, and that consideration having failed.

Even taking the arrangement between pursuer and defender to have amounted to an application for shares in the limited company (which I do not think it was) there is

nothing in the adopted agreement (No. 7/3 of process) obliging the company to allot 250 shares to the pursuer. An application for shares is no more than an offer, which can be resiled from up to the moment of acceptance, and, in the case of a limited company, there is only one form of acceptance recognised by the law, namely, an allotment note. In the case of *Pellat* v. *Richmond Hotel Company*, 1867, 2 Ch. App. 527, Lord Cairns said, "I think that, where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract."

This being the law, even as regards a company actually registered at the time an application is made, it applies, of course, with much greater force where the offer to take shares is made, not to a registered company, but merely to the promoter of a prospective company, not yet registered.

The defender suggests in argument that, although all the shares were allotted to him, he held 250 of them in trust for pursuer, pending payment of the last instalment of £50. And that he will fulfil his obligation to pursuer if he now transfers 250 shares to him. I think this argument is obviously unsound. As I have pointed out, transfer of shares never was contemplated in August, 1921, by either party.

In any event, what we have alone to do with is the situation at 21st October, 1921, when pursuer made his demand for repayment of his £200. At that date no company shares existed, so that none could be transferred, any more than they could be allotted.

Of the counter claim, £12 is salary paid to pursuer, before the limited company was incorporated. As pursuer rendered services for this, I should think defender's claim for repetition is very thin, indeed; but I need not consider this, as pursuer is willing to restore the position as it existed in August, 1921, which is, in the circumstances, perhaps a quite reasonable proposition, for the right to resile from an offer perhaps reasonably infers that the position, as it existed before the offer was made, should be reverted to on both sides. T. A. F.

The judgment was acquiesced in.

For pursuer—Mr. D. G. OGILVY (Messrs. Donald Binnie & Co.), Glasgow.

For defender—Mr. J. BOYD DUNLOP (Messrs. Cochran, Stout, & Dunlop), Glasgow.

No. 33.
Lanarkshire
Fritz's Agency, Ltd. *v* Moss' Empires, Ltd., &c.

Fritz's Agency, Limited, *Pursuers;* Moss' Empires, Limited, Arrestees, and Scott & Whaley, Harry Clifford Scott and Edward Peter Whaley, Common Debtors, *Defenders.*

Diligence—Arrestment—Future or contingent debt—Sum to become due under contract—Furthcoming—Arresters' claim against common debtors impugned by arrestees.—Held (1) that arrestees cannot impugn arresters' claim against common debtors; (2) that a sum to fall due to common debtors under a contract is arrestable, although not prestable at time of arrestment and although contingent on the actings of the common debtors, and decree granted against arrestees for amount arrested.

The subjoined interlocutor and note of the Sheriff-Substitute (Lyell), against which no appeal was taken, sufficiently state the facts of the case and the pleas of parties:—

Feb. 14, 1922
Sheriff Lyell

Glasgow, 14*th February*, 1922.—Having considered the closed record and heard parties' procurators, finds in fact (1) that the pursuers are creditors of the common debtors by virtue of a decree of this Court dated 21st October, 1921, decerning them to pay the pursuers £80, with interest and expenses, all as set forth in the extract decree (No. 6/3 of process); (2) that the common debtors do not appear herein to dispute their indebtedness under the said decree: Finds in law that the compearing defenders, the arrestees, have no title or interest to impugn the arresters' claim against the common debtors; therefore repels the first plea in law stated for the compearing defenders: Finds further in fact (3) that the common debtors during the week beginning 10th October, 1921, and ending Saturday, 15th October, 1921, were engaged in giving performances twice nightly at the Coliseum Theatre, Glasgow, under a contract entered into between them and the arrestees, dated 3rd August, 1916, by virtue of which the arrestees agreed to pay to the common debtors the sum of £105 on the completion of the said twelve performances, with one-twelfth more for any extra performance, on the conditions and stipulations set forth in the said contract (No. 8/1 of process); (4) that on 11th October, 1921, on the dependence of their said action against the common debtors and in security, the pursuers arrested in the hands of the arrestees the sum of £130, more or less due and addebted by them to the common debtors: Finds in law that in the event of the common debtors completing their said contract with the arrestees, which they did, the said arrestments validly attached the entire salary payable by the arrestees to the common debtors under the said contract, or so much thereof as would satisfy the pursuers' debt under

the said decree together with the taxed expenses of this process; therefore repels also the second plea in law stated for the compearing defenders, and decerns against the said defenders, Moss' Empires, Limited, for payment to the pursuers out of the sum so validly arrested in their hands of a sum sufficient to satisfy the pursuers' claim against the common debtors as constituted by the said decree, an extract of which is contained in No. 6/1 of process, together with the taxed expenses of bringing this action into Court, and *quoad ultra*, finds the compearing defenders liable in expenses; allows an account thereof to be given in, and remits the same to the Auditor to tax and report.

WILL. DARLING LYELL.

Note.—This is an action of furthcoming directed against Moss' Empires, Limited, as arrestees, and a firm of Scott & Whaley, variety artistes, and Harry Clifford Scott and Edward Peter Whaley, the partners of that firm, as common debtors. The pursuers found upon a decree, an extract of which is contained in No. 6/3 of process, obtained in this Court on 21st October, 1921, by them against the common debtors as partners and as individuals jointly and severally, for £80, with interest from 11th October, and £9 10s. of expenses. The common debtors do not appear to dispute their indebtedness to the pursuers under that decree. The arrestees, however, plead that the Court had no jurisdiction to pronounce it in respect that the arrestments used *ad fundandam jurisdictionem* were inept. I confess that I cannot see what interest the arrestees can qualify to propound such a plea. Setting aside the obvious answer that the decree is good until it is reduced, and that the common debtors have not taken steps to set it aside, I have always understood that the only person entitled to dispute the debt of the common debtor to the arrester is the common debtor himself, and that the common debtor is made a party to an action of furthcoming in order that he may have an opportunity of so doing if he has any objection to state. The rule is so stated in the text-books, *e.g.*, 2 Bell's Commentaries, 7th ed., 64—"It is the business of the original creditor alone" (*i.e.*, the original creditor of the arrestee) "to object to the claim of the arrester; and if he do not appear and object, the arrestee has no right or interest to take up the plea." In *Houston* v. *Aberdeen Banking Company*, 1848, 11 D. 1490, the general rule was given effect to, that an arrestee has no interest to dispute an arrester's debt, in respect that it is of no consequence to an arrestee whether he pays one party or the other so long as he obtains an effectual discharge. (See also M'Laren's Court of Session Practice, p. 792; Dove Wilson's Sheriff

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Court Practice, p. 352—"The arrestee cannot dispute the debt due by the common debtor to the arrester.")

As against this well-established doctrine, the agent for the compearing defenders referred to the case of *Smyth* v. *Ninian*, 5 S. 7, part of the rubric of which is to the effect "that it is competent to the arrestee to plead in a furthcoming that the decree of constitution obtained by the pursuer against a foreigner was obtained without establishing a jurisdiction by arrestment *jurisdictionis fundandæ causa*." When that case is examined, however, it will be found that it proceeds on the ground that the foreigner, the common debtor, was never properly made a party to the furthcoming, and therefore the arrestee could not pay in safety. He was thus entitled in his own interest to state the plea. Here we have common debtors who were well aware of the original decree, for it appears from the extract that they vainly endeavoured to be reponed, and who have been cited in this action at the address where they were cited in the original action. It appears to me, therefore, that the case of *Smyth* v. *Ninian* is only an authority for what it decides, and does not impinge upon the rule that the only person who may in a furthcoming impugn the common debtor's debt to the arrester is the common debtor and not the arrestee. In *Donaldson* v. *Ord*, 17 D. 1053, the very point here taken by the arrestees was decided adversely to their contention. The validity of the decree itself not being disputed by the common debtor, it was there held to be incompetent in an action of furthcoming "to inquire into the circumstances attending the arrestment *jurisdictionis fundandæ causa*, on which the summons in the action wherein the said decree was pronounced proceeded." (Interlocutor of Lord Robertson, Ordinary, at p. 1058, approved by Hope, L.J.C., at the foot of p. 1065.)

I must, therefore, repel the arrestees' first plea in law. According to the extract decree produced, the common debtors are resting owing to the pursuers a sum of £80, plus interest and expenses. The common debtors do not dispute their indebtedness in that sum, and as the common debtors have been duly made defenders in this process, the arrestees have neither title nor interest to raise the question.

The arrestees' second plea, on the other hand, is one which they have both title and interest to propound. It is to the effect that the pursuers' arrestments on the dependence of their action against the common debtors attached nothing, as at the time when these arrestments were used there was no sum due by the arrestees to the common debtors.

The admitted facts are as follows:—During the week beginning 10th October, 1921, and ending Saturday, 15th

October, 1921, the common debtors were giving performances in the arrestees' Glasgow music hall, under a contract dated 3rd August, 1916, the salary payable to the common debtors for twelve performances being £105, from which there fell to be deducted £10 10s. in name of agent's commission. The present defenders maintain that no part of that £105 was payable until the common debtors had fulfilled their entire contract, and that therefore the arrestments used by the pursuers in their hands on the dependence of the aforesaid action attached nothing in respect that these arrestments were used on Tuesday, 11th October. Acting upon this view of the law, the arrestees took it upon themselves to disregard the arrestments and to pay the sum which the arrestments purported to arrest to the common debtors, and they now appear to defend their actions.

It is right that I should refer in the first place to a clause in the contract on which the arrestees appear to place some reliance. It occurs at the end of clause 13, and is in these terms—"The artiste shall not assign, mortgage, or charge the artiste's salary nor permit the same to be taken in execution." It is to be observed that the pursuers were not parties to that contract, and it is difficult to see how any agreement between A and B can effectually interpel C, a creditor of B, from taking all lawful steps to enforce his claim. The pursuers' contention in this regard was negatived by a divisional Court in England in the case of *Shaw* v. *Moss*, 1909, 25 T.L.R. 190.

With regard to the defenders' plea that an arrestment used on the Tuesday was ineffectual to attach sums due under a contract until the whole work contracted for had been performed at the end of the week, I was referred to a judgment of my own in an action of multiplepoinding, *Moss' Empires, Limited* v. *Monks and Others*, dated 16th March, 1914, the soundness of which it is proposed to test in these proceedings. As that case was not so far as I know reported, and as after consideration I remain of the opinion then expressed, I propose to transcribe here, *mutatis mutandis*, what I then ventured to say.

It is necessary to consider the contract between the common debtors and the arrestees. Its main provision was that the common debtors, on the one hand, undertook to perform at the theatre at two performances nightly for one complete week from 10th October, 1921, and the arrestees, on the other, undertook to allow them to give these performances and to pay them £105. It is not doubtful that a breach of that contract would have given good ground on either side for an action of damages. It is true that there are in the contract certain ancillary provisions, such as a provi-

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sion that the common debtors were to receive an additional one-twelfth part of their salary for any extra performance at a matinee; that no salary was to be paid for any performance from which the common debtors might be absent through illness or their own default, or for days on which the theatre might be closed; and a provision for forfeiture and liquidated damages if the common debtors should be absent except from illness or accident; but these provisions do not in my opinion effect the transformation of the one contract to pay £105 for twelve performances into twelve separate contracts to pay one-twelfth part of £105 for each single performance.

The condition of affairs when the pursuers' arrestment of 11th October, 1921, was laid on was therefore this, that a binding obligation had been entered into on the part of the common debtors to complete the contract which they were then fulfilling, and on the part of the arrestees to pay them £105 on the completion thereof, that obligation being contingent on the common debtors fulfilling their contract by completing their twelve performances. I think there is authority in our law for holding this arrestment good in such circumstances, although execution cannot proceed further and be made effectual by a furthcoming until the debt shall become payable (2 Bell's Commentaries, 7th ed. 65). Of this there are numerous illustrations in the reports. In *Strachan* v. *M'Dougle*, 1835, 13 S. 954, it was held competent to arrest the contents of a policy of life insurance; and in *Smith & Kinnear* v. *Burns*, 1847, 9 D. 1344, it was decided that an arrestment of an annuity, payable weekly, covered not only arrears, but also the annuity of the week current at the time of the arrestment. In *Jamieson* v. *Sharp*, 1887, 14 R. 643, it was taken for granted that a fund which was vested in the common debtor but not payable till after the death of an annuitant, might lawfully be arrested, the point there decided in this connection being that when a creditor had so arrested, he must bring his forthcoming within the three years in order to evade prescription of the arrestments even although the annuitant was still alive, and in that connection the Lord President said (at p. 648)—"No doubt, had there been any double distress or any competition for the arrested fund, an action of multiplepoinding would have been competent, though the fund was not immediately payable."

But the case which approaches most nearly to the present, and which, in my opinion, governs it, is the case of *Marshall* v. *Nimmo*, 1848, 10 D. 328, which was mentioned with approval by Lord Kincairney in *Lucas's Trustees*, 1894, 21 R. at p. 1099. In that case a slater had undertaken to slate a

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house at a certain sum per rood. After the slates were on the ground, but before any of the work had been done, a creditor of the slater arrested in the hands of the employer. It was held that this arrestment was good to cover the price of the slater work due to the slater on the completion of the contract. The note of the Sheriff on p. 329, and the opinion of Lord Moncreiff, on p. 332, are most instructive, and are, in terms, applicable to the facts of the present case. "The case," says Lord Moncreiff, "is simply a contract for work to be performed, the price to be paid when the work is completed. The question is whether, during the progress of the work, the price may be arrested for intermediate security, though no execution can follow till it is actually payable by the work having been completed. I see no reason to doubt that an arrestment of a claim of this nature is good. The obligation is fully contracted, though the implement of it depends upon a condition."

Standing the case of *Marshall* v. *Nimmo*, I do not see how I can do other than decide that the arrestment used on the Tuesday was effectual, although the rights of the common debtors under the contract with the arrestees were not prestable till the Saturday. In that case, as Lord Kincairney pointed out in *Lucas's Trustees*, 21 R. at p. 1099, the creditor of the common debtor "was held entitled to arrest the sum that would fall due under the contract, although it was not then due, and might not become due at all, as, for example, if the slater had not performed his contract." It is true that I have heard the soundness of that decision doubted; but being of opinion that it governs this case, I conceive it to be my duty to follow it. W. D. L.

For pursuers—Mr. DAVID U. DICKIE (Messrs. Dickie & Simons), Glasgow.

For defenders, Moss' Empires—Mr. LAWRENCE MARSHALL (Messrs. Blair & Marshall), Glasgow.

SHERIFF COURT OF AYRSHIRE.

IN WILLIAM WILLIAMSON'S SEQUESTRATION.

No. 34.
AYRSHIRE
Williamson's Sequestration

Bankruptcy—Sequestration—Trusteeship—Objections—Production of vouchers with claim—Execution of claim by company—Bankruptcy Act, 1913, *secs.* 45 *and* 24.—*Held* (1) that landlords claiming under lease must produce their lease as a voucher with their claim; (2) that an ordinary director of a limited company is not a "principal officer" competent to execute a claim by the company as creditors in a sequestration.

At Kilmarnock Sheriff Court on 13th inst. Sheriff-Substitute Dunbar gave judgment in a competition between Mr. James Boyd, accountant, Dalry, and Mr.

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Williamson's Sequestration

Frederick C. Dewar, chartered accountant, Ayr, for the office of trustee on the sequestrated estates of William Williamson, some time farmer, Wester Monkriddan, Kilwinning, and now residing at 24 Sidney Street, Saltcoats. At the meeting for election of trustee Mr. Dewar had an apparent majority in value of voters' claims over Mr. Boyd. Objections were lodged by Mr. Boyd to certain votes tendered for Mr. Dewar, and, among other objections, the following were stated by him:—

(1) The vote of Robert Kenneth and James Kenneth as individuals, and the said Robert Kenneth, James Kenneth, and David Gillies, as trustees of the deceased Archibald Kenneth, proprietors of the said farm of Wester Monkriddan, for £167 1s. 8d., in respect that they had failed to produce with their oath and affidavit the lease of the subjects therein claimed being one for rent due in terms of a written lease founded on by them; and

(2) The vote for £91 15s. 9d. of Motherwell & Urquhart, Limited, grain merchants, Kilmarnock, in respect that the oath bore to be signed by H. F. Bowie, a director of the company, the ground of objection being that said H. F. Bowie was not a "principal officer" of the company within the meaning of sec. 24 of the Bankruptcy (Scotland) Act, 1913.

The interlocutor of the Sheriff-Substitute (Dunbar) is as follows:—

Jan. 13, 1922
Sheriff Dunbar

Kilmarnock, 13*th January*, 1922.—The Sheriff-Substitute, having heard the agents for James Boyd and Frederick C. Dewar, competitors for the office of trustee on the sequestrated estates of the within designed William Williamson, and having considered the note of objections lodged for the said James Boyd, and having considered the whole process, no note of objections having been lodged for the said Frederick C. Dewar, sustains the objections stated to the vote of Robert Kenneth and others; finds it unnecessary to deal with the other objections stated by the said James Boyd; finds that the said James Boyd has a majority of good and valid votes, and therefore finds and declares him to have been duly elected trustee on said sequestrated estates; finds the said Frederick C. Dewar liable

to the said James Boyd in £3 3s. of modified expenses, and grants decree for payment thereof. | Wm. Dunbar.

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Note.—In my opinion the vote of the Kenneths was invalid in respect that their claim was not vouched by production of their lease. Under sec. 45 of the Act of 1913 no creditor is entitled to vote until he has produced the appropriate vouchers (*Menzies* v. *Duff*, 13 D. 1044; *Tytler* v. *Walker*, 10 R. 699; *Williamson's Sequestration*, 28 Sh.Ct.Rep. 244). It was suggested that the lease might be produced now: but the passage cited in favour of this from Goudy, 4th edition, pp. 159-160, does not, in my opinion, support it.

This is sufficient for present purposes. Had it been necessary, I should have been prepared to hold the vote of Messrs. Motherwell and Urquhart also invalid in respect that an ordinary director does not come within the category of "secretary, manager, cashier, clerk, or other principal officer," of a company within the meaning of sec. 24 (*Beddie, Cameron & Co.*, 14 Sh.Ct.Rep. 76). W. D.

For Mr. Boyd—Mr. Joseph Kirkland, Saltcoats.
For Mr. Dewar—Mr. James D. Wyllie, Kilmarnock, instructed by Messrs. Andrew & Addison, Ayr.

SHERIFF COURT OF ROXBURGHSHIRE.

James Allen, *Pursuer;* Thomas Henderson, *Defender.* No. 35.

ROXBURGHSHIRE
Allen v Henderson

Negligence — Contributory negligence — Proximate cause—Leaving horse unattended—Leaving motor car in unauthorised place.—The pursuer left his motor car standing unattended on a piece of ground adjoining a railway station, notwithstanding that the railway company had issued a prohibition against leaving motors there. The defender, a cab proprietor, having business at the same station, left his horse and carriage unattended near pursuer's car. The horse was startled, and in running away damaged pursuer's car, which damage the latter sought to recover from defender. *Held*, in the circumstances, that though defender was negligent, the contributory negligence of the pursuer prevented him recovering. *Barty* v. *Harper & Sons*, 1921, 2 S.L.T. 277, referred to. *Observations* of Lord Chancellor in *s.s.* "*Volute*," 15th December, 1921, as to contributory negligence, applied.

The facts and circumstances of this case are amply stated in the subjoined interlocutors of the Sheriff-Substitute (Baillie) and the Sheriff (Chisholm):—

Jedburgh, 13*th December*, 1921.—The Sheriff-Substitute, having considered the proof and whole process and heard

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parties' procurators in debate, finds in fact that opposite the railway station buildings at St. Boswells there is a space of open ground terminating on the Auction Mart side in a recess bounded on one side by the station buildings and on two other sides by a sleeper fence, as shown on the plan (No. 12 of process); that a notice is affixed by the railway company to said fence prohibiting motor cars being stationed there; that on 2nd November, 1920, pursuer left his motor car in said recess, with the front of the car about 4 or 5 feet from the fence which projected at right angles from the station buildings, and thereafter proceeded to the Auction Mart; that shortly thereafter the defender, who is a cab proprietor, arrived at the railway station in the course of his business, and, after setting down his passengers, drew up his cab and horse behind said car, and proceeded upstairs on to the platform to inquire about parcels for one of his customers and was absent some ten minutes, leaving the horse and cab unattended during said time; that during his absence the horse was frightened by a motor tractor, and moved forward alongside said car to get into said recess, where it had frequently stood, and, after getting into said recess, tried to pass between the front of the car and the fence, and drew part of the cab over the bonnet of the car and thereafter kicked out at said car; that damage was caused to said car to the extent of £24 10s. 8d; Finds in law that the defender was at fault in leaving said horse unattended, and that the accident was the result of said fault; therefore finds the defender liable in damages to pursuer, and assesses the same at £24 10s. 8d; grants decree therefor, and finds the defender liable to the pursuer in expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report, and decerns. Ronald Baillie.

Note.—The defender left his horse and cab unattended and went upstairs on to the railway platform for purposes of his own business as a cab proprietor. He had previously, in accordance with a regulation of the railway company, drawn his horse and cab away from the entrance to the station, and he left it standing behind a motor car which was stationed in a recess enclosed on three sides. It did not appear at the proof how much of the open ground opposite the buildings belonged to the railway company and how much was part of the public thoroughfare, but it would appear that the recess was treated by the railway company as their own private property, and they had fixed up a notice there prohibiting motor cars being stationed there. This recess was required for their railway purposes, and consequently, the company frequently, on days when there was

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Allen v Henderson
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a large attendance at the Auction Mart, employed the police to keep this recess clear of motor cars, though on this particular day their official either did not know or took no exception to this car being left there. It would also appear that cab drivers attending the station were allowed to stand their cabs in the recess without objection by the company, though Mr. Little, the stationmaster, was clear that they were not allowed to leave them there unattended, and was also clear that certain ropes which had been affixed to the fence in this recess had not been affixed by the company, and that no one had a right to tie horses there. The defender stated that he wished to put his horse and cab in the recess, where he had frequently placed it, and where the horse was accustomed to stand quietly, but that he found the recess filled by two motor cars, and consequently left it standing behind one of the cars. Whether even with these cars there he could not have drawn up alongside them was not quite clear, though it would appear, looking to the width of the recess, some 24 feet, that there should have been room for a cab alongside two motor cars. That, however, is not of real importance, as, in my opinion, it was incumbent on the defender when he found he could not get into the place he says he wished to, and when, according to him, he was obliged to leave his horse in an unaccustomed place, to take reasonable precautions that the horse did not cause any damage. The horse was frightened by the sound of a motor tractor, and moved slowly forward into the recess, turned to the right between the car and the fence, and dragged the cab over the bonnet of the car, and, getting frightened, started kicking. It is therefore apparent that if the defender had been anywhere near his horse he could easily have stopped it at once. He, however, was at the time absent on the railway platform, and absent for a period of about ten minutes, which differentiates this case from those of which *Shaw* v. *Croall & Sons*, 12 R. 1186, is an instance.

While, therefore, the pursuer was to blame in leaving his car in a forbidden place, the proximate cause of the accident was defender's action in leaving his horse unattended, and on this point I would refer to Lord M'Laren's opinion in *Carse* v. *North British Steam Packet Company*, 22 R., at p. 484, and the cases he there refers to. As stated by the Lord President in *Barty* v. *Harper & Sons*, 1921, 2 S.L.T., at p. 277, "the real question is, what was the real cause of the accident?" and, in my opinion, the real cause of the accident was the absence of the defender from his horse. I shall therefore find the defender liable in damages.

R. B.

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March 9, 1922
Sheriff Chisholm

Jedburgh, *9th March*, 1922.—The Sheriff, having considered the proof and the process, sustains the appeal. Recalls the interlocutor of the Sheriff-Substitute of 13th December, 1921, complained of: Finds in law that the defender, in leaving his horse unattended, as it is admitted that he did, was negligent and in fault: Finds further in law that the pursuer, in leaving his car where it is admitted that he did, was also negligent, and by his negligence contributed to the accident which caused the damage to his car; therefore sustains the third plea in law for the defender, and assoilzies him from the conclusions of the action, and decerns; finds the pursuer liable to the defender in his expenses of the cause and of the appeal; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report; and remits the case to the Sheriff-Substitute. John Chisholm.

Note.—On 2nd November, 1920, the pursuer, who is a farmer, motored in his own car to Newtown St. Boswells, in order to attend a sale of horses at Swan's Auction Mart. On his arrival there he, instead of putting his car into a garage, left it standing unattended on a piece of ground belonging to the North British Railway Company, adjoining their station. To leave the car there was against the orders of the company. It was proved that at times railway police or county police were employed to order the removal of cars from there. There was a notice, on a board fixed at the place, in these terms, "Notice.—Motor cars not to be left standing here. By order" (No. 13 of process). The pursuer on this occasion had no business in connection with the railway. Ignoring the prohibition of the railway authorities, he left his car on this space and went into the Auction Mart, where he intended to remain, and did remain, a considerable time.

The defender is a cab proprietor and posting-master at The Green, St. Boswells. He carries on a considerable business in connection with the railway and the station, and his cabs meet practically every train there. On the morning in question the defender drove a single horse in a wagonette, containing four persons, to the station, for trains leaving shortly after eleven o'clock. Having set down his passengers, the defender moved his horse and trap a little away from the station entrance, in accordance with a notice requiring this (No. 14 of process), which was posted up at that place. In ordinary course he would have taken the horse into the place in which the pursuer's car was standing. Such was his practice and that of other drivers whose business was with the station, and this had been his practice for a number of years. The railway company allowed this, and

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had never taken exception to it. On this occasion, however, finding that this space was blocked to him by the presence there of the pursuer's and another car, he left his horse standing facing the pursuer's car, and a short distance beyond the entrance to the station. Then he went into the station to inquire whether certain parcels which he had been employed to fetch had arrived.

The defender's horse and trap and the pursuer's car were thus both left unattended—the latter at a place where the owner was forbidden to leave it, the former at a place where he was allowed to leave it for a time while he was dispatching his business. While this was the position of affairs, a motor lorry passed under the railway bridge, a few yards away, and chanced to "back-fire" as it passed. The noise, which was very loud, appears to have startled the defender's horse and made it move (apparently rapidly) towards the pursuer's car—towards the place where it was accustomed to stand. In its progress it brought the wagonette into collision with the pursuer's car, and dragged it on to the bonnet, and, being unable to get the trap free, it lashed out with its hind feet and damaged the car. The damage caused amounted to £24, the sum sued for. The Sheriff-Substitute has decided in favour of the pursuer.

I have found the able arguments on each side of the bar very helpful. But there are elements in the case which render its decision to me by no means easy.

The first question is, was the defender in fault in the circumstances I have described? On the authority of the opinions of the majority of the Court (Lord Trayner dissenting) in the case of *M'Ewan* v. *Cuthill*, 25 R. 57, I must hold that the defender was in fault in leaving his horse unattended and proceeding on to the station platform, to a place some distance from it, and from which he could not see it. In these respects it is impossible to distinguish between the "back shop" in *M'Ewan's* case and the station platform in this case. I must take it that the decision in *M'Ewan's* case puts a limitation on the application of the ratio of the decision in the earlier case of *Shaw* v. *Croall & Sons*, 12 R. 1186. In both cases the horse was a quiet horse, as the horse in question in the present case was. There was no reason to anticipate that the animals would bolt. In *Shaw's* case the driver, who at the moment his horse ran off was 10 yards from its head, with, I gather, his back towards it, was held not to be in fault. In *M'Ewan's* case the driver of a van had gone into the back shop of the person to whom his load was consigned, in order to ascertain where the goods were to be deposited. Now, I confess that I have difficulty in understanding why either the

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duration of the driver's absence from his horse or the precise distance from it to which he goes in the performance of his business should of itself determine the question of his liability. As regards time, it humbly seems to me that, unless the man remains away from his animal so long as to weary it or to let it become hungry, and thereby make it restless, and so cause the accident in consequence of the duration of his absence, it is not *de facto* of moment whether the absence is for half a minute or extends to ten minutes. This backfiring tractor, for example, was just as likely to pass during the first few minutes of the defender's absence as during the last. The few minutes during which the driver in *Shaw's* case was beyond control of his horse afforded sufficient time for it to run away, get into the public street, and cause the death of a man. It was the play of chance in each case. The same, in my humble opinion, may be said of the matter of the distance. Of course, the distance may also be considered as a matter of time—the time it will take the man to reach his horse on emergency. But in either aspect of it, if the driver is only a foot too far away to control his horse at the critical moment, does it make it any worse that he should be 20 feet or 20 yards further off? It is not open, however, to the judge of an inferior Court to give practical effect to considerations of the kind. The decision in *M'Ewan's* case is binding where, as here, the circumstances of the driver's absence (as regards distance from the horse and being out of sight of it) are not distinguishable in any material respect. Therefore I must hold that the defender was wrong in leaving his horse as he did.

The defender pleads that the pursuer also was in fault. There seems to be good ground for the plea. In the two cases to which I have referred the victims of the accidents were persons walking on public streets. They were legitimately and in ordinary course at the places where they were knocked down. But here the pursuer's property, his motor car, was where he had no right to leave it—where he was prohibited from leaving it. His standpoint when he raises the action strikes one as somewhat exacting. Having left his car in a forbidden place, and where it was fairly certain to be some obstruction at least to the ordinary traffic of those who had business at the station, he claims to be indemnified against all risk from that traffic. That, however, is by the way. I think that his conduct in placing his car where he did, and in continuing to leave it there, was negligent, and contributed to the accident from which he suffered injury to his property. In the case of the *Admiralty* v. *The Owners of the s.s. "Volute,"* 15th December, 1921 (reported as yet only in Weekly Notes, No. 1, 7th January, 1922), in the House of Lords, the Lord Chancellor laid down

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this general principle on the question of contributory negligence—" While, no doubt, where a clear line could be drawn, the subsequent negligence was the only one to look to, there were cases in which the two acts came so closely together, and the second act of negligence was so much mixed up with the state of things brought about by the first act that the party secondly negligent, while not held free from blame, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution." I think that is what has occurred in the present case. The pursuer's negligence consisted not only in originally placing his car where he did. There was also negligence, *de momento in momentum*, in continuing to leave it, an obstruction and itself exposed to danger, in this forbidden place. In the words of the Lord Chancellor, the pursuer " having, in the ordinary, plain, common-sense view of this business, contributed to the accident," it is right to hold both parties to blame for the damage to the car. The pursuer, therefore, is not entitled to succeed in his claim.

J. C.

For pursuer—Mr. SYDNEY B. MURRAY, Jedburgh.
For defender—Mr. DAVID M. STURROCK, Jedburgh.

SHERIFF COURT OF PERTHSHIRE.

No. 36.
PERTHSHIRE
Cesari, &c. *v* Anderson

Mrs. NORA CESARI and Others (Trustees), *Pursuers;* KENNETH ANDERSON, *Defender.*

Landlord and tenant—Ejection—Notice of removal—Lease containing obligation to remove without warning—Sheriff Courts Act, 1907, *sec.* 37, *rule* 110.—A lease of a furnished house was contracted for one year from 1st July, 1920, under the declaration that parties might terminate the lease at Whitsunday, 1921, on one month's notice in writing, and containing an obligation by the tenant to flit and remove at the expiry of the lease without warning or other process of removing. The lease was not terminated at Whitsunday, 1921, and at 30th June, 1921, the natural termination of the lease, the tenant declined to remove, contending that he was entitled to forty days' written notice. Action of ejection by the landlords *dismissed* as irrelevant, in respect that notice in terms of above statute not given; such notice to be a writing different from the lease itself. *Observations* as to discrepancy between sec. 37 and rule 110 (*supra*) and method of reconciling them.

The judgments of the Sheriff-Substitute (BOSWELL) and the Sheriff (SANDEMAN) are contained in the annexed interlocutors:—

Nov. 1, 1921
Sheriff BOSWELL

PERTH, *1st November*, 1921.—The Sheriff-Substitute, having considered the cause, sustains the pleas in law for the

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pursuers, and, in respect of no relevant defences, grants warrant to eject in terms of the crave of the initial writ; finds the defender liable to the pursuers in expenses; allows an account to be given in, and remits the same when lodged to the Auditor to tax on the higher scale, and to report.

C. P. Boswell.

Note.—I am informed that the defender has given up the house, and that I am only asked to determine the rights of parties and the matter of expenses.

The lease here was for one year, for though dated within the year, it speaks as from its date, and though it contained a break, that break was not made use of. The action being one for ejection from a house, it falls under sec. 37 of the Act of 1907. That section requires written notice, which has not been given, apart, of course, from the lease. Sec. 37, however, must, in my opinion, be read along with rule 110 of the Act. The present action is an action of removing in the sense of the section last mentioned. For my view on this point I rely on the dicta in *Campbell's Trustees* v. *O'Neil*, 1911, S.C. 188. The only remaining question is whether the defender bound himself to remove by writing, dated and signed, within twelve months of the term, in the sense of the same rule 110. In my view, the lease is such a writing. What the rule did was to enact into statute law the case of *Paxton* v. *Slack*, Hume, 568, mentioned in Hunter, vol. ii., p. 32.

It may be objected to the view here taken that implications from rule 110 are allowed to override express words in sec. 37. To take the last point first, express words are one thing and clear words another. The first sentence of sec. 37 is not in form a legislative enactment, but a bit of unrelated moral declamation. When the section is read as a whole, the following items of meaning can be extracted from it:—

(1) Tacit relocation can be terminated by notice in writing (whatever that may be).

(2) When so terminated, "summary ejections in common form" comes (or may come) in place of the merely ministerial ejections which followed on an action of removing.

What, then, is "notice in writing"? Is a lease containing an obligation to remove (when signed within the time mentioned in rule 110) a "notice of termination given" in the sense of sec. 37? Now, "bound himself to remove" in rule 110 means (and the Legislature knew it) "bound himself to remove without warning or process or removal," the usual technical words as in this lease. It may well have been that having "without warning" in mind, the Legislature did not see the need of saying expressly that the obliga-

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tion was to go as notice under sec. 37. It implies it, however, for any other view makes nonsense of rule 110 (*c*), or, alternatively, of sec. 37 and rule 110 taken together. I put the view opposed to mine into parallel columns—

In the case of a house—

Rule 110.	Rule 110 (*c*).
(1) Action may be raised at any time.	(1) Action may be raised at any time.
(2) Notice in writing must be given. (When?)	(2) 40 days' notice must be given.

Now, when must notice be given under rule 110? If forty days, then rule 110 is identical with rule 110 (*c*). If not, then notice must be given, but no one knows when. Either conclusion is absurd, which shows that the view under examination is the wrong one.

I do not think the view here taken conflicts with any case known to me, and, in particular, not with the Perthshire case of *Plumb* v. *Mayall*, 37 Sh.Ct.Rep. 23. C. P. B.

Jan. 12, 1922
Sheriff SANDEMAN

PERTH, 12*th January*, 1922.—The Sheriff, having considered the cause, sustains the appeal for the defender; recalls the interlocutor of the Sheriff-Substitute, dated 1st November, 1921; sustains the first plea in law for the defender, and dismisses the action; finds the pursuers liable to the defender in his expenses of the cause and of the appeal; remits the same when lodged to the Auditor to tax and to report; and remits the case to the Sheriff-Substitute.

CONDIE SANDEMAN.

Note.—This is an action for the summary ejection of the defender from Woodburn, a house at Birnam. The defender became tenant under a lease for one year from 1st July, 1920, but there was reserved to the lessors a power to terminate the lease at Whitsunday, 1921, on giving one month's notice. The lease was dated in January, 1921, and contained the usual clause binding the tenant to flit at the end of the lease.

The landlord did not avail himself of his option to terminate the lease at Whitsunday, 1921, and did not give notice in terms of sec. 37 of the Sheriff Courts Act, 1907. At 30th June, 1921, the natural ish of the lease, the defender declined to remove. He maintains that he was entitled to forty days' notice, in terms of the section cited above. The pursuers maintain that no such notice was necessary, because the lease, signed by the tenant within a twelvemonth of the termination of the year, contained an obligation to remove at the term, and has thus the effect of a "writing" in the sense of rule 110 of the First Schedule

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of the Act of 1907. It was also argued on behalf of the pursuers that, in respect of the break in their favour, the lease was not one for a year.

I am unable to accept either of these arguments. Dealing with the second, I think the lease is not for a year in the sense of sec. 37 of the Act; but were it held to be only for the period to Whitsunday, 1921, it appears to me that notice would still have been required in terms of sec. 38 of the Act. The question accordingly seems to depend on the effect of reading together sec. 37 and rule 110. The rules take their force from sec. 39, which refers to them as "rules of procedure." Now, a rule of procedure in a schedule, if inconsistent with a clear enactment in the Act, would, in my opinion, have to give place. But I do not find any inconsistency between the section and the rule. They both contemplate an already established relationship of landlord and tenant: that is, they contemplate a lease as already in existence when the notice or writing is given or made. The notice to be given in writing under sec. 37 is something different, I think, from the lease itself, and, similarly, in rule 110 I regard the "writing" as a writing by a tenant: that is, by some one who is already a tenant; so that, if the tenancy is constituted by a written lease, in my opinion the rule contemplates a writing different from the lease itself and of the nature of the writings referred to in secs. 35 and 36 of the Act. Looked at in this way, the clauses appear to me to be consistent. Regarded otherwise there would be a conflict between the enactment of sec. 37 and the rule 110, in which case, I think, the section would prevail. C. S.

For pursuers—Mr. John Campbell, Perth.
For defender—Mr. D. A. Coates, Perth.

SHERIFF COURT OF ORKNEY & SHETLAND.

No. 37.
Orkney and Shetland
Johnston *v* Homer

Mrs. Ann Harrold or Johnston, *Pursuer;* Dr. Thomas Homer, *Defender.*

Workmen's Compensation Act, 1906, *Schedule I.* (3)—*Domestic employment—Medical services claimed to be a "benefit."*—A woman employed as an ordinary domestic help having met with an accident in the course of her duties, causing a fracture of her thigh bone, sued for compensation, and her employer (a doctor) claimed that his account for professional attendance was a "benefit" to be taken into account in fixing weekly payment. *Held* this account not a "benefit" in the sense of the statute.

This was an arbitration under the Workmen's Compensation Act, 1906, in which compensation was sought

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for personal injury sustained by claimant while in the course of her domestic duties as the defender's servant. Various defences were stated and, *inter alia*, that defender's account for medical attendance on claimant in connection with the injury sustained in consequence of her accident amounting to £25 6s. 6d. was a "benefit" in the sense of sec. 3 of Schedule I. of the Workmen's Compensation Act, 1906, to be taken into account in fixing the amount of the weekly payments due to the claimant. The Sheriff-Substitute (MARTIN LAING) dealt with the point as appears from the subjoined interlocutor:—

Oct. 21, 1921

Sheriff LAING

KIRKWALL, 21*st October*, 1921.— . . . Finds in law (1) that the defender is liable to pay to the pursuer compensation as for total incapacity from 15th April, 1921, till the further orders of the Court; (2) that the account of defender (No. 9 of process) is not a benefit in the sense of sec. 3, Schedule I. of the Workmen's Compensation Act, 1906, to be taken into account in fixing the amount of the weekly payments due by defender to pursuer; finds defender liable to pursuer in expenses, &c.

A. MARTIN LAING.

Note.— . . A more difficult point is raised by defender's fourth plea, that the account for medical attendance (No. 9 of process) is a "benefit" in the sense of the Act, to be taken into account in fixing the amount of compensation. This account is for 135 visits, at 3s. 6d. per visit, plus one guinea for setting the fracture and 13s. for medicine and dressings. The defender cited as his authority *Sorensen* v. *John Gaff & Co.*, 1912, S.C. 1163. But, in my opinion, that case differs essentially from the present. There the account was that of a third party, and there was an obligation on the defenders to aliment pursuer while he was in their service. I specially refrain from making any comment here as to how this account came to be rendered or as to its amount. All I say is that, in my opinion, it is not a "benefit" in the sense of the Act to be taken into account in the fixing of the amount of compensation. I think *Gilroy* v. *Mackie*, 1909, S.C. 466, and *Rosewell Gas Coal Company* v. *M'Vicar*, 1904, 7 F. 290, are much more nearly in point, with the reasoning in the latter of which cases, might I most respectfully say, I entirely agree as well as feel bound to follow. A. M. L.

For pursuer—Mr. J. C. MORRICE, Kirkwall.
For defender—Mr. F. BUCHANAN, Kirkwall.

SHERIFF COURT OF DUMBARTONSHIRE.

No. 38.
Dumbarton-shire
Britton *v* Anderson

JOHN BRITTON, *Pursuer;* WILLIAM ANDERSON, *Defender.*

Landlord and tenant—Increase of Rent, &c. (Restrictions) Act, 1920—*Suspension order—House not "reasonably fit for human habitation or not in a reasonable state of repair"—Certificate from sanitary authority—Decorations.—Held* (1) that the existence of defects necessary to warrant a suspension order must be proved in the ordinary way. A specification of defects in a certificate from the sanitary authority is neither conclusive as to the facts nor as to the legal effect of the defects stated in it; and (2) that, in the circumstances, the defects stated in the sanitary inspector's certificate and averred by pursuer were not relevant to ground an application for an order suspending increase of rent.

In this action the tenant of a house at 24 Dumbarton Road, Clydebank, craved the Court to grant an order on the landlord suspending increase of rent "until the necessary repairs mentioned in the report of the sanitary authority hereinafter referred to shall have been executed to the satisfaction of the Court." The certificate referred to is quoted and the facts otherwise are sufficiently stated in the judgments of the Sheriff-Substitute (MENZIES) and the Sheriff (MACPHAIL) contained in the following interlocutors:—

Nov. 23, 1921
Sheriff Menzies

DUMBARTON, 23*rd November*, 1921.—The Sheriff-Substitute, having heard parties' procurators upon the defender's preliminary pleas, repels his first and second pleas, allows him a proof of his averments in condescendence 3 as to the pursuer's agreement as to papering and painting, and the pursuer a conjunct probation, on a day to be afterwards fixed, and decerns.

A. J. P. MENZIES.

Note.—This is an application by a tenant for an order to suspend increase of rent imposed by his landlord under paragraphs (*c*) and (*d*) of the first sub-sec. of sec. 2 of the Rent Act of 1920. Now, as I read this provision, the procedure to follow upon such an application is this. The applicant must support his application by either (1) a statutory certificate of the sanitary authority that his house (*a*) is unfit for human habitation, or (*b*) is not in a reasonable state of repair; or (2) by evidence to the same effect at common law in either case to the satisfaction of the Court as to the alleged defect. If the Court is thus satisfied of the defective condition of the house, the de-

fences open to the landlord before an order for suspension of the increase is made are three—(1) the defective condition complained of is due to the tenant's neglect; (2) it is due to the tenant's default; or (3) breach of an express agreement, that is, his failing to do something he has agreed to do, or his doing something he has agreed not to do. If any such defence is set up and substantiated, no order shall issue; if no such defence is set up, or if the defence set up on any of these grounds fails, an order shall issue. The order having been issued, it can only be recalled upon the landlord making application to the Court for that purpose, and founding (1) upon a statutory report of the sanitary authority, or (2) on a proof at common law, in either case to the effect that the necessary repairs have been executed. This proof seems to me to be his opportunity of challenging the details of the original certificate of the sanitary authority upon which the Court has acted in making the order for suspension.

Now, the pursuer in the present case supports his application by a certificate from the sanitary authority to the effect that the house is not in a reasonable state of repair in respect of certain defects specified in the certificate.

The defender states as a preliminary defence in his first plea that the action is irrelevant. At the bar he explained his position upon this plea to be this. The defects so specified as being necessary repairs are, in so far as not remedied, concerned with "decoration," and are not "repairs" in the sense of the Act, which, otherwise expressed, is that the house is in a reasonable state of repair as it is.

This is just the same defence, therefore, as his denial in fact, in answer 4, of the truth of this certificate, upon which his second plea is partly founded. The second branch of this plea is founded upon his averment, also in answer 4, that the certificate is not in proper form, but he entirely fails to specify in what respect it is so, and therefore the averment is worthless.

Now, the pursuer dealt with these two pleas of the defender by raising the point quite sharply in debate that the production of the statutory certificate is enough for him at this stage in the procedure, in order to satisfy me that the house is in the condition therein certified. I agree with the pursuer as to this. I fail to understand what object the statute could have had in making express and exclusive reference to the certificate of a public authority as something with which the Court might be satisfied if it intended to allow the defender by a simple denial of its contents to go at this stage into a proof in contradiction

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of it. I hold it to be good *prima facie* evidence of the state of the house, which can only be rebutted in the manner I have pointed out above, viz., by proof in an application for recall of the order of suspension. I am therefore satisfied that the house is, as it is certified by the sanitary authority to be, not in a reasonable state of repair, and have repelled the defender's first and second pleas in law.

I now pass to the defences upon the merits open to the landlord at this stage of the statutory procedure.

The landlord here sets up the defence that the tenant under the contract of let, by virtue of which he obtained possession on 28th December, 1920, expressly undertook to do any papering and painting required in the house, including what is necessary to remedy the defects specified in the certificate of the sanitary authority, and that the existence of the defects so specified is due solely to the default on the part of the pursuer to implement his express agreement. The defender avers that the house was in the same condition as it is in now when the pursuer entered upon the tenancy of it.

This is an issue of fact stated with reasonable clearness by the defender, and before anything further can be done a proof of his averment must be allowed to the defender.

What the position of the defender will be if he succeeds in his proof does not seem to have been contemplated in the pleadings. The defender avers, in answer 3, that the pursuer undertook to have the "decoration" specified in condescendence 3 executed. But what is specified in that condescendence with respect to the kitchen, at least, is only defects requiring repair, and not decoration in any sense of the word. If the pursuer is liable for these repairs, it would seem to have the result of raising questions as to the defender's title to impose an increase under paragraph (d) (1). Consideration of this situation at this stage might avoid unnecessary complications at a later stage.

A. J. P. M.

Jan. 26, 1922
Sheriff Macphail

Dumbarton, 26*th January*, 1922—The Sheriff, having considered the cause, sustains the appeal, recalls the interlocutor of the Sheriff-Substitute of 23rd November, 1921, complained of; sustains the first plea in law for the defender, viz., that the action is irrelevant, and dismisses the action and decerns; finds the pursuer liable to the defender in his expenses, including the expenses of the appeal; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and to report, and remits the case to the Sheriff-Substitute.

J. R. N. Macphail.

Note.—I am unable to agree with the views regarding procedure which have been expressed by the Sheriff-Substitute. In my opinion, the pursuer of such an action must *ante omnia* satisfy the Court that the house is "not in all respects reasonably fit for human habitation or is otherwise not in a reasonable state of repair." On analysis this proposition of fact involves two separate things—(1) establishing the existence of certain defects, and (2) showing the Court that these defects make the house either (*a*) not in all respects reasonably fit for human habitation, or (*b*) not in a reasonable state of repair. The first is a pure question of fact; the second depends on the opinion of the Court.

In the absence of contradiction, the Court may quite well accept a certificate from the sanitary authority as establishing the facts. But if the accuracy of the certificate is challenged, it seems to me that the pursuer must at that stage establish these facts by evidence in the ordinary way. When the facts are ascertained, it is then for the Court to decide whether or not they have the result of bringing the house within either of the categories mentioned in the Act. If they do, an order for suspension will be granted, and will last until the defender in his turn has similarly satisfied the Court that the condition of the house has changed. Neither as evidence of fact nor as an expression of opinion is the certificate of a sanitary inspector, therefore, possessed of the importance attributed to it by the Sheriff-Substitute.

In the present case the pursuer has obtained a certificate from the sanitary inspector of the burgh of Clydebank to the effect that he has examined the house and "finds that it is not in a reasonable state of repair by reason of the following defects:—

"*Kitchen.*—Wallpaper on lower part of walls has been removed to repair plaster work, and has not been renewed in three places, each measuring 3 feet by 3 feet, 2 feet by 3 feet, and 3 feet by 6 feet or thereby.

"*Lobby.*—Wallpaper in a dirty and discoloured condition.

"*Room.*—Wallpaper in a dirty and discoloured condition. Window requires pointing."

At the hearing of the appeal I was informed that the pointing of the window had been done, so that is out of the case.

The accuracy of this certificate is challenged by the defender, and if I thought inquiry necessary I should order a proof, in which the pursuer would have had to establish the facts on which he founds and the defender

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would have had an opportunity of establishing his averments to which the existing proof is limited.

But, as I have already said, even if the pursuer were to establish the existence of the specific defects mentioned in the certificate, it is for the Court, and not for the sanitary inspector, to determine what is their legal effect. It is not suggested that either under the statute or at common law a landlord could be compelled to repair the alleged defects, and the pursuer cannot say they were unknown to him when he took the house. It is therefore somewhat difficult for him now to maintain that by reason of their existence the house is not in good and tenantable repair.

But, apart from this, I am of opinion that the alleged defects, even if proved, would not have the effect of making the house "not in a reasonable state of repair."

I therefore sustain the first plea in law for the defender, and dismiss the action. J. R. N. M.

For pursuer—Mr. T. G. Muir, Dumbarton.
For defender—Mr. David Harvey, Glasgow.

SHERIFF COURT OF LANARKSHIRE.

No. 39.

Lanarkshire

Livingstone *v* Summerlee Iron Co., Ltd.

James Livingstone, *Pursuer;* Summerlee Iron Company, Limited, *Defenders.*

Compensation—Notice of accident—Prejudice—Mistake or other reasonable cause.—A workman met with an accident by being struck on the left side of the abdomen on 22nd December, 1920, and worked on till the 31st December, when the pit closed for the New-Year holidays. While working during said period, he suffered pain, and was aware of a swelling in his side. On or about 3rd January, 1921, he took to his bed, and notice was given on his behalf on 11th January. *Held* that notice was not given as soon as practicable after the happening of the accident, that the employers were prejudiced in their defence by want of said notice, and that want of notice was not due to mistake or other reasonable cause, and compensation refused.

The interlocutor of the Sheriff-Substitute (Macdiarmid) fully explains the case:—

Oct. 6, 1921

Sheriff Macdiarmid

Airdrie, 6*th October*, 1921.—The Sheriff-Substitute, having heard parties' procurators and considered the cause, finds in fact (1) that on 22nd December, 1920, the pursuer was injured by accident arising out of and in the course of his employment with the defenders by being struck on the left side of the abdomen by the buffer of an empty hutch, with which a runaway hutch had collided; (2) that he was totally incapacitated; (3) that his average weekly earnings

were £4 10s.; (4) that he worked on until the pit closed for the New-Year holidays on 31st December, 1920; (5) that while working from said 22nd to 31st December, 1920, he suffered pain; that he was aware of a swelling on his left side, which increased in size and became harder as the days passed, and that he had to be assisted in his work; (6) that on or about 3rd January, 1921, he had to take to his bed, and that on or about 20th January, 1921, he was operated upon, and an abscess at the site of the pain of which he complained, and involving the abdominal wall, was opened and drained; (7) that notice of said accident was given on his behalf to the defenders on 11th January, 1921; (8) that said notice was not given as soon as practicable after the happening of the said accident; (9) that the defenders were prejudiced in their defence by the said want of notice in respect that their medical men were unable to see the pursuer while evidence of his having sustained a blow from the said hutch might have been present; (10) that said want of notice was not due to mistake or other reasonable cause, in respect that the pursuer was aware that he had sustained injury which was so serious as to prevent him doing his full amount of work, and worked on to the holidays, in the hope that the rest which he then should have might result in an alteration for the better of his condition; in these circumstances, refuses the prayer of the petition, and dismisses the same; finds the pursuer liable to the defenders in expenses; allows an account thereof to be lodged, and remits the same when lodged to the Auditor of Court to tax and to report. D. S. MACDIARMID.

Note.—In this action the workman, James Livingstone, seeks to recover from the employers, the Summerlee Iron Company, Limited, compensation under the Workmen's Compensation Act, 1906, in respect of total incapacity caused, he avers, by an accident which befell him in their employment on 22nd December, 1920. Two defences are proponed. The employers plead that they have been prejudiced in their defence by reason of the inexcusable delay of the workman in giving notice of the alleged accident, and, secondly, that the alleged accident did not occur.

It is necessary, in the view I take of the case, to dispose of the latter defence first. The story of the workman is that on 22nd December, 1920, he was standing in a lye of the pit beside two empty hutches, one of them his, and the other the witness Bryce's; that while so standing there the witness Thomson lost control of a full hutch on the brae; that the runaway hutch came into the lye and struck the empty hutches, whereby Livingstone's hutch, or both hutches (the evidence is not very clear on this point, but the other hutch

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is not of much moment, for, if it was derailed, it went in the opposite direction to Livingstone's stance), was derailed; and that one of the buffers thereof struck him on the left side. He says that he suffered pain, and that at the time he told Thomson, Bryce, and the fireman Weir that the hutch had struck him.

He continued to work until 31st December, when the pit closed down for the New-Year holidays. His evidence is—and in this he is confirmed by the witness Morgan, to whom he was acting as drawer—that whenever (and it was immediately after the alleged accident) he got back to Morgan's place he told Morgan that he had been struck; and the evidence of these witnesses further is that he worked with difficulty up to 31st December. Thomson depones that Livingstone frequently during these days spoke to him of the pain he was suffering. Livingstone himself says that all the time he felt the pain, and that a swelling in his left side increased and developed into a hard lump. On this something further remains to be said when the other defence comes to be considered.

On the day after the pit closed down Livingstone went on holiday to his sister's at Chapelhall, and there he had to take to his bed. On 3rd January, 1921, he was there examined by a medical man, who diagnosed a large hæmatoma, that is to say, a large swelling filled with blood, at the site at which Livingstone complained of pain. By the 14th the slight temperature and feverish pulse which had been found had disappeared, as also had to a considerable extent the pain and tenderness, although the swelling was still palpable, and Livingstone was permitted to return home. There, on the 19th, he was examined by his own medical man, who diagnosed an acute abscess at the site where the hæmatoma had been. Livingstone was removed to the Western Infirmary on the same day, and there operated upon, and the abscess opened and drained. That, briefly stated, is the sequence of events revealed by the evidence of Livingstone and the medical men.

In arriving at a conclusion as to whether or not Livingstone was struck by the hutch, as he alleges, there is available the evidence of the men who were in the vicinity of the hutches when they collided, the evidence of those who saw Livingstone and with whom he spoke during the days he continued at work, and the medical evidence. The purport of the medical evidence is that a hæmatoma can only be caused by a blow or knock of one kind or another, that the hæmatoma diagnosed on 3rd January could be the result of a blow received on 22nd December, and that the abscess diagnosed on 19th January and found on operation could be due

to the breaking down of the hæmatoma. The medical men examined for the workman were all of opinion that his story was entirely consistent with the condition they found. Their evidence goes no further, for, in the first place, the hæmatoma had disappeared by the 19th, and an abscess may, of course, have its origin in a cause other than a blow, so that the medical men who only diagnosed or saw the abscess cannot say with certainty that it was the result of a blow; and, in the second, the hæmatoma may have been caused, not by the blow inflicted by the hutch, as alleged by the workman, but by another blow, sustained, *e.g.*, in a fall from a bicycle, or with the fist or otherwise, about the time of the collision of the hutches. But, in any event, the workman's story is consistent with the condition found by the medical men.

We accordingly come to the evidence of accident. Now, the evidence of those who were in the vicinity when the collision occurred cannot be said to be entirely satisfactory. That a collision, as spoken to by the workman, did occur does not admit of doubt, and is, indeed, admitted by the employers. Livingstone's evidence is that he told Bryce, Thomson, and Weir that he had been struck. Bryce says that he does not remember this. Thomson confirms Livingstone. Weir, the fireman, not only says that Livingstone did not say to him that he had been struck, but, on the contrary, says that when he (Weir) asked him if he had been struck, Livingstone replied that he had not. It seems to me, however, from the evidence, clear that there was considerable confusion at the time; that there was a general impression that Livingstone, from the position in which he was standing, ran every chance of being struck; and, indeed, Bryce, who himself had taken refuge behind the timber when he saw that a collision was inevitable, says that he was not surprised to hear afterwards that he had been struck, for he didn't see how he could have escaped. Again, all the witnesses, with the exception of Weir, and this includes Riley, a bencher, who was working some 40 yards away and came to the sound of the collision, are agreed that they heard Livingstone say, "That was a near thing," and that they understood by that that, while Livingstone had been struck, the accident was not so bad as it might have been. He might quite easily have been killed. If Thomson's evidence is to be believed, it appears to me that there is sufficient corroboration of Livingstone's story. Thomson was undoubtedly in the best position to hear what Livingstone said, and was the man most nearly concerned in the result of his having allowed his hutch to run away. He was not in a position, following his runaway hutch, actually to see the further end of the empty hutch

strike Livingstone, but naturally he shouted out to Livingstone, "Did it strike you?" and he says that Livingstone replied in the affirmative. It was, however, sought to be shown that Thomson had told a different story when examined by the manager, but this appears to me to be doubtful, and was stoutly denied by Thomson in the witness-box. He appeared to me to be a somewhat stupid but not untruthful witness. But if Thomson's evidence was affected by this suggestion, it does seem to me that Weir's evidence was also somewhat confused; and, on the whole matter, I have come to be of opinion that, looking to the fact of the collision, to Livingstone's position relative to the empty hutch, and to the evidence of himself and Thomson, with such corroboration as it received from the evidence of Bryce and Riley as to the impression left on their minds, that there is sufficient to hold that the fact that the hutch struck Livingstone is proved. And we have further the evidence of Morgan and of Mrs. Livingstone. If their evidence is to be believed, it materially helps the workman on this point. Morgan, to whom Livingstone worked as drawer, says that immediately after the alleged accident, that is, as soon as he returned to the place where Morgan worked, Livingstone told him that he had been struck by the hutch, and he goes on to say that during the days he worked he did so with difficulty. Mrs. Livingstone, the workman's mother, says that when he came home from the pit on that day he would not take his food, but lay down on the couch, and when she asked him what was wrong he said that he had been struck by a hutch. On the whole matter, therefore, I have come to be of opinion, although with some hesitation, that it is proved that the workman was struck in the manner and on the date he alleges.

But then we come to the employers' first or preliminary defence. It appears to me not to admit of doubt that notice was not given as soon as practicable after the happening of the accident. The workman endeavoured to establish that he gave notice to Weir, the fireman, immediately after the accident happened, but this is very far short of being proved. Weir denies it absolutely, and there is no corroboration of the workman's allegation. Further, if notice was in fact given on 22nd December, why did Morgan again give notice to the manager on 11th January? That remains unexplained. It appears to me to be proved that the latter date was the first upon which notice was given, and if we accept Morgan's statement that he endeavoured to give notice immediately upon the pit reopening—that is, about the 8th—but that Weir would not accept it, on the ground that it was too late—and this Weir confirms—and take it, as on the evidence

would seem to be the fact, that the 11th was the first practicable date upon which Morgan could have seen the manager, there remains the days, from the 22nd to the 31st December inclusive, upon which Livingstone had ample opportunity to give notice of the accident.

Further, in my view, the employers were prejudiced, and I incline to think, in all the circumstances, somewhat seriously prejudiced, by the want of notice. Notice on 11th January meant, as the medical evidence shows, that the employers' medical men were denied an opportunity of seeing the workman when his condition was such as would have enabled them to form an opinion as to the truth of his story. By the time that arrangements could have been made for their seeing him all medical evidence of the fact of a blow had passed away. The hæmatoma had broken down and an abscess had formed. On the other hand, had they been able to see him a reasonable time after the accident, they would have been able to advise as to whether the story he told was consistent with the condition in which they found him. Livingstone himself says that from 22nd to 31st December the swelling in his left side continued to increase in size and to become harder, and on 3rd January, as I have pointed out above, a hæmatoma was diagnosed.

Something was said in debate on the fact that the employers did not lead medical evidence, but the criticism appears to me to be pointless, for their evidence could only have been directed to the question of prejudice, and prejudice was freely admitted by the medical men for the workman, one of whom, in fact, said that even when he saw him on 3rd January, he was "undoubtedly" not in so good a position to form an opinion as to the origin of the condition as he would have been had he seen him shortly after the accident.

In these circumstances, the question remains—was this want of notice occasioned by mistake or other reasonable cause? This question must, I think, always present some difficulty. The principle upon which a decision falls to be reached is clearly laid down by the Lord President (Lord Dunedin) in *Ellis* v. *Fairfield Shipbuilding and Engineering Company, Limited*, 1913, S.C. 223. I would also refer to the remarks of the learned judges in the English case of *Webster* v. *Cohen Bros.*, as found in Mr. Adshead Elliot's book on the Workmen's Compensation Act, at pp. 153-4 of the seventh edition. The cases of *Ellis* and *Webster* may serve as contrasts, and it appears to me that here we have a case which approximates more nearly to the latter than to the former. It appears to me not to admit of doubt that, on the evidence here, the workman

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knew that he had sustained a somewhat serious injury, but determined to work on until the holidays, in the hope that the rest which he would then be able to have would effect a cure. He says that the pit closed for the holidays on 31st December, "That was the last day the pit was open. I was anxious to work on to the holidays. I thought I would get a rest after (he means during) the holidays, and that perhaps it (the pain) would wear off. I thought it would go away." Again, "During these days that I worked the swelling increased. It developed into a hard lump. I felt the pain when I was working. I complained to John Morgan and to John Thomson." He was then asked by his agent, "*Q.* During these days you worked, up to the stopping of the pit for the holidays, were you able to do your full work?—*A.* Not the same as my usual. *Q.* Did any of the others help you?—*A.* John Morgan gave me a hand." On the day after the pit closed he says he went to his sister's house. "*Q.* When you were in her house, did you feel any difference in your side?—*A.* It had been getting worse every day, and that was the last day I felt I could hardly bear it. It got so bad that I could hardly bear it. It became so bad that my sister had to send for a doctor." According to his own story, therefore, this workman knew that he had sustained an injury—the evidence was daily present to him in pain and a swelling on his left side which grew larger and harder as the days passed—and although the injury did not prevent him from working, it was serious enough while he worked to prevent him from doing his wonted amount of work. He had to receive assistance. And he was induced to continue at work, and not because he thought that the injury was trivial, but because he thought, so he says, that his condition would improve or the injury disappear because of the rest which he would be able to have during the holidays. It appears to me, in these circumstances, that want of notice was not due to mistake or other reasonable cause. D. S. M.

For pursuer—Messrs. Hay, Cassels, & Frame, Hamilton.
For defenders—Mr. W. T. Craig, Glasgow.

No. 40.
Lanarkshire
Walker *v* M'Lean, &c.

Mrs. Marion Walker, *Pursuer;* Hugh M'Lean and Others (Walker's Trustees), *Defenders.*

Contract — Against public policy — Innominate—Promise of payment to wife refraining from raising action of divorce—Liability of executors of promisor—Proof.—The pursuer averred that in 1896 she informed her husband's father that she intended to sue for divorce on the ground of adultery, but that her father-in-law undertook, if pursuer would refrain from taking such action, to pay her an annuity of £1 a week for life; that

she accepted this offer, and did not raise an action for divorce; that her husband died in 1913; that in 1912 she agreed to the annuity being abated to 15s. a week; that her father-in-law paid the annuity up to his death in 1919; and that his executors made payment of it up to 1921, when they ceased doing so. She now sued the executors for payment. *Held* (1) that the contract, even if relevantly averred, was illegal, and, in any event, being innominate, could only be proved by the writ of the deceased father-in-law, and (2) that pursuer's averments did not instruct a contract, but merely a promise personal to the deceased father-in-law; and, further, that proof of the obligation alleged to be incurred by the father-in-law and transmitted to his executors under this promise must be by writ.

The following is the interlocutor issued by the Sheriff-Substitute (LEE), and in it the essential averments by pursuer are quoted:—

Dec. 8, 1921
Sheriff LEE

GLASGOW, *8th December*, 1921.—The Sheriff-Substitute, having heard parties' procurators and considered the cause, sustains the first plea in law of the defenders, and dismisses the action as irrelevant; finds the pursuer liable to the defenders in expenses; allows an account thereof to be lodged, and remits to the Auditor of Court to tax and report. B. P. LEE.

Note.—I think that there are several reasons why this action cannot be allowed to proceed.

The pursuer was married in 1891, being then only seventeen years old. In 1896 she informed her father-in-law, the late Alexander Walker, that, on account of her husband's adultery, she intended to sue for a divorce. Her averment is that thereupon "the said deceased Alexander Walker pleaded on pursuer not to sue for a divorce, and represented to her that such action on her part would involve a public scandal which would seriously and detrimentally affect his business and social status, and that of the other members of his family. At the same time (1896) the said deceased Alexander Walker offered and undertook that, if pursuer would refrain from taking action, he would pay her an alimentary annuity for life of £1 a week. Pursuer accepted said offer, and did not sue said action of divorce." The pursuer's husband was sent to South Africa at the expense of his father in 1896, and died there in 1913. The pursuer further avers that in 1912 she agreed to this "annuity" being reduced from £1 to 15s. a week; that Alexander Walker continued to pay it to her until his death on 7th September, 1919, and that after his death the defenders, as his trustees and executors,

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"acknowledged and continued to pay said annuity of 15s. per week to pursuer until 13th May, 1921, when without cause they ceased doing so." On these averments she has raised this action, in which she craves the Court to find and declare that the said deceased Alexander Walker came under obligation in or about the beginning of the year 1896 to pay to her an annuity for life of £1 a week, subsequently reduced in or about the beginning of 1912 to 15s. a week, and that the defenders, on accepting office as trustees and executors, acting under Alexander Walker's trust disposition and settlement, acknowledged the said obligation to pay to the pursuer said annuity of 15s. a week, and implemented the same until 13th May, 1921, and to ordain the defenders to continue to implement said obligation.

The action is, I suppose, laid on contract. Assuming that the pursuer has relevantly averred a contract, I do not think that it is one that could sustain an action. On the principle expressed in the maxim, "*ex turpi causa non oritur actio*" contracts inconsistent with public policy, which include contracts against the policy of the domestic relations, are ineffectual, and cannot be enforced. Among the illustrations of such contracts given in Bell's Principles (s. 41) is a contract for forbearing to expose adultery or sue for divorce, and (s. 39) a bond imposing a restraint on marriage. Although the defenders have not pleaded that the contract averred by the pursuer is illegal, it is *pars judicis* to take cognisance of it (*Hamilton* v. *M'Lauchlan*, 1908 (O.H.), 16 S.L.T. 341).

The defenders' second plea in law is that this being an innominate contract of an unusual kind, it can only be proved by the writ of the deceased Alexander Walker. Still assuming that a contract has been relevantly averred, I think that this plea is well founded, and, as it appears to be conceded that there is no writ, this would put an end to the action. In the old case of *Miller* v. *Tremamando*, M. 12395, and Hailes' Decisions, p. 409, it was held that provisions and jointures were not probable by witnesses. The Lord President, who was one of the dissentient judges, agreed with the majority that those parts of a contract which are generally committed to writing, and relate to a future period, ought not to be proved by witnesses. This decision was approved in *Smith* v. *Oliver*, 1911, S.C. 103.

But I do not think that the pursuer has averred a contract. What she does say is that her father-in-law, being anxious for his own sake to avoid the scandal of a divorce, offered and undertook that, if she would refrain from taking action, he would pay her an alimentary annuity for life. Then she goes on to say that she accepted

said offer and did not sue. It is, I think, clear that this is not a mutual contract. The pursuer came under no obligation. She was asked to refrain, and she did refrain, but she came under no obligation to refrain, from suing for divorce. All that the averment really comes to is that Mr. Walker made her a verbal promise that if she did as he wished he would go on paying her £1 a week as long as she lived. He kept that promise till his own death, more than twenty years later, but he has made no provision for the payment being continued. The pursuer does not suggest that he ever undertook to make provision for her after his death, and I cannot see anything in her pleadings to instruct liability on the defenders as his executors. The averment that after Mr. Walker's death "the defenders acknowledged and continued to pay said annuity" can only mean that, with the consent of the beneficiaries for whom they act, they continued payment, not under obligation, but *ex gratia*. The case of *Smith* v. *Oliver*, *supra*, decides that the obligation under an alleged verbal promise to pay can be proved only by writ, and if the pursuer's averment of what the late Mr. Walker undertook to do for her could be held to include a promise to have this payment continued after his death, parole evidence would have to be excluded. B. P. L.

For pursuer—Messrs. DAVID COOK, WALLACE, & Co., Glasgow.
For defenders—Messrs. TURNBULL & FINDLAY, Glasgow.

DAISY HAMILTON MITCHELL, *Pursuer;* THOMAS SHANKS, *Defender.*

Landlord and tenant—Removing—Title to sue—Infeftment.—Held that personal title is sufficient to enable a general disponee to pursue an action of removing, provided that pursuer takes infeftment before decree is pronounced.

The pursuer in this action was the general disponee of the late proprietor, who had let the subjects to the defender. At the date of raising of the action pursuer was not feudally vested in the subjects. Subsequent to the action being raised pursuer expeded a notarial instrument following upon general disposition in her favour, which was sent to the register and which was not produced. The defender's plea of no title to sue was repelled. The interlocutors of the Sheriff-Substitute (MACDIARMID) and the Sheriff (MACKENZIE) fully explain the case:—

AIRDRIE, 15*th November*, 1921.—The Sheriff-Substitute, having heard parties' procurators on the preliminary pleas, repels the first and second pleas in law for the

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defender; allows parties a proof of their respective averments; said proof to proceed on a day to be afterwards fixed. D. S. Macdiarmid.

Note.—The defender does not insist on the second plea in law, and it therefore falls to be repelled.

The first plea raises a purely technical point. It is said that the pursuer has no title to sue because her title to the subjects in question is not yet on the register. She is the general testamentary disponee of her late husband, who was the proprietor of the said subjects, and it appears to me that the defender's point is met by the production in process of the holograph will (No. 7/1), the draft notarial instrument (No. 7/2), and the receipt of the keeper of the General Register of Sasines (No. 7/3). The receipt is, I think, evidence that the notarial instrument is on the register.

It is unnecessary to add more, but I must say that, even had the pursuer's title not been completed, I should have had some doubt whether the defender, whose title to possess flowed from the pursuer's deceased husband, whose general disponee she is, could have successfully insisted on this plea as against this pursuer. D. S. M.

The defender appealed to the Sheriff (Mackenzie), who adhered as follows:—

Dec. 17, 1921
Sheriff Mackenzie

Glasgow, 17*th December*, 1921.—The Sheriff, having considered the cause, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute, dated 15th November, 1921, complained of; finds the defender liable to the pursuer in the expenses of the appeal; allows an account thereof to be given in, &c. A. O. Mackenzie.

Note.—It was argued for the appellant that the pursuer had not a good title to sue in respect that she had not, prior to the action, and, indeed, has not yet, obtained infeftment in the subjects from which she seeks to remove the defender. I am unable to sustain this objection. The pursuer is the general disponee of her husband, who was the owner of the property and the granter of the lease which is the defender's title of possession. She is vested, therefore, so far as appears, with a personal right to the ownership of the subjects, and the defect in her title is one which, in my opinion, can be cured prior to decree. This has been held in the case of an heir (*Mackintosh* v. *Munro*, 17 D. 99; *Scott* v. *Fisher*, 10 S. 284; *Brown* v. *Lang*, Hume, 565), and appears also to have been held in the case of a singular successor in *Milne* v. *Petrie*, *M.*, Appendix—Removing, p. 10, and Mr. Rankine, in his book on Leases, third edition, 515, expresses the opinion

that such a defect in title may be cured before decree. I am therefore of opinion that the Sheriff-Substitute was right in repelling the plea to title.

Appellant's agent also sought to take exception to the sufficiency of the notice given, but, from a consideration of the averments of parties, I do not think this question can be disposed of without inquiry. A. O. M. M.

For pursuer—Messrs. MOTHERWELL & M'MURDO, Airdrie.
For defender—Messrs. REID & BETT, Airdrie.

LANARKSHIRE COUNTY COUNCIL, *Complainers;* THOMAS BAXTER, *Respondent.*

Summary complaint—Excise penalty—Roads Act, 1920, *sec.* 1 (2) *and sec.* 8 (3)—*Finance Act*, 1920, *Schedule II., Articles* 3 *and* 6—*Title to prosecute.—Held* that a county council has no title to prosecute in its own name for excise penalties under the Roads Act, 1920.

This was a prosecution brought in the Sheriff Court at Hamilton by the Lanarkshire County Council against Thomas Baxter, motor hirer, Blantyre, for excise penalties. He was charged that he, having taken out from the County Council licences for three mechanically propelled vehicles, to be used solely for the purpose permitted by article 6 of the Second Schedule to the Finance Act, 1920, for a certain period, for which he paid licence duties, did, on 3rd September, 1921, use the said vehicles for some other purpose, viz., as hackney carriages, as defined in sec. 4 of the Customs and Inland Revenue Act, 1888, contrary to sub-sec. 3 of sec. 8 of the Roads Act, 1920, whereby he had incurred excise penalties of three times the difference between the duties actually paid and the duties payable on licences appropriate to the vehicles when used as hackney carriages. In the instance of the complaint the complainers described themselves as "acting under the Roads Act, 1920, and as such duly authorised by sec. 1 (2) of the said Act to recover penalties for offences under said Act."

At the first diet on 12th December, 1921, the respondent pleaded (1) that the County Council had no title to prosecute, and (2) that the complaint was irrelevant in respect the vehicles were not licensed for a sole purpose under the Second Schedule of the Finance Act, and that no offence under the Roads Act, sec. 8 (3), was committed unless the vehicles were licensed

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for the sole purposes contemplated by articles 4 and 5 of that Schedule. The respondent's second contention was sustained by the King's Bench Division of the High Court of Justice in England on 20th January, 1922 (*Rex* v. *Wood and Others*, *Times* Law Reports, vol. 38, p. 269) when a conviction against Arthur Anderson by the magistrates of Widnes was quashed, but that decision was not given when this case was debated on 22nd December, 1921. The Sheriff-Substitute (Hay Shennan) made avizandum, and on 12th January, 1922, sustained the respondent's first plea and dismissed the complaint. His decision is as follows:—

Jan. 12, 1922
Sheriff Shennan

Hamilton, 12*th January*, 1922.—This complaint is brought on the instance of "the County Council of the county of Lanark, acting under the Roads Act, 1920, and, as such, duly authorised by sec. 1 (2) of said Act to recover penalties for offences under said Act."

The respondent objects to the instance on the ground that the County Council is not authorised by that Act to institute proceedings in its own name, but that such proceedings must be taken in the name of an officer of the County Council. The objection is highly technical, but, in my opinion, it is a sound objection, and must be sustained.

Sec. 1, sub-sec. 1, of the Roads Act, 1920, provides that duties on mechanically propelled vehicles and other carriages shall, after 1st January, 1921, be levied by County Councils. Sub-sec. 2 provides that "every County Council and their officers shall . . . have within their county for the purpose of levying the duties aforesaid . . . the same powers, duties, and liabilities as the Commissioners of Customs and Excise and their officers have with respect to duties of excise . . . and all enactments relating to these duties and to punishments and penalites in connection therewith shall apply accordingly." The sub-section is certainly not very exactly framed. It is possible to read it as meaning that the County Council is to have the same powers, &c., as the Commissioners of Customs and Excise and their officers, but this would involve as a corollary that the officers of the County Council would also have all of their powers, &c., which would lead to absurd results. Such a reading is plainly hypercritical, and the sub-section must be interpreted as if the word "respectively" had been inserted at the appropriate place. Clearly the intention of the sub-section is to give to the County Council the powers, &c., of the Commissioners, and to the officers of the County Council the powers, &c., of the officers of excise.

The recovery of penalties under the Acts administered by the Commissioners of Customs and Excise is regulated by 53 & 54 Vict. cap. 21, secs. 21 *et seq.* Sec. 21, sub-sec. 1, enacts—"It shall not be lawful to commence proceedings against any person for the recovery of any fine, penalty, or forfeiture . . . . except by order of the Commissioners and in the name of an officer . . . or in Scotland in the name of the Lord Advocate." It seems to me impossible to resist the conclusion that in like manner it is not lawful to commence the present proceedings except by order of the County Council and in the name of an officer.

It was objected that the Roads Act does not require the County Council to appoint officers. But the Act presupposes that the County Council does its ordinary work by means of officers, and, as at present advised, I think that the County Council may authorise any of its officials to act as officers for the purposes of the Roads Act. The County Council could not issue licences except at the hand of an officer. The method of procedure obviously is that the County Council should order proceedings to be taken for recovery of a penalty in the name of one of its officers. It is not authorised to institute proceedings in its own name. It was suggested that the phraseology of sec. 13, sub-sec. 5, of the Roads Act contemplated recovery of penalties "by the County Council or by any other person." I confess I do not understand the reference to "any other person" so far as Scots practice is concerned. It may be necessary in England. But recovery in proceedings taken by order of a County Council in the name of an officer is plainly recovery by the County Council through one of its officials. The object of this sub-section is to place on County Councils the duty which is placed on the Commissioners of Customs and Excise by 54 & 55 Vict. cap. 24, sec. 1, sub-sec. 2.

In my opinion, the instance in this complaint is bad, and the complaint must be dismissed.

The respondent also took objection to the relevancy of the complaint. It is not necessary for me to decide the points which he raised. But my impression is that I could not have disposed of his objections without first ascertaining the facts. HAY SHENNAN.

For complainers—Mr. R. B. WALKER, for Sir Thomas Munro, Hamilton.

For respondent—Mr. ROBERT LAMOND, Glasgow.

No. 43. Mrs. Fitzgerald, *Pursuer;* James Simpson, *Defender.*

Lanarkshire

Fitzgerald *v* Simpson

Landlord and tenant—Hypothec—Sale of property and tenant's business at same time to same purchaser—Half-year's rent unpaid by selling tenant.—Held that purchaser of tenant's stock, who was also the purchaser of the heritable property, was liable in payment of the rent for the half-year preceding the term of entry.

The facts are shown in the pursuer's claim which was as follows, and which, except in minor matters, was admitted by defender.

The pursuer was until Martinmas, 1921, the heritable proprietrix of the subjects consisting of house and shop known as Rokeby, 942-944 Crow Road, Glasgow. For the year Whitsunday, 1921, to Whitsunday, 1922, a Mrs. Jeannie Henry was tenant of the said subjects at a rent of £9 15s. per quarter. By missive dated 3rd and 18th October, 1921, pursuer sold the said subjects to defender for settlement and entry at Martinmas, 1921. At or about the same date in October defender purchased from the said Mrs. Henry her whole business, stock, furnishings, and fittings in said premises at the price of £100, and entered into possession of same prior to the said term. The stock, furnishings, and fittings in said shop were value for at least £50. The defender thereby acquired the whole of the subjects which formed the pursuer's hypothec for the quarter's rent due Martinmas, 1921. Immediately prior to the said term the said Mrs. Henry emigrated from this country and failed to make payment of the quarter's rent due pursuer at said term of Martinmas, amounting to £9 15s. as aforesaid. The defender has sold the greater part, if not the whole, of the said stock, furnishings, and fittings, and as intromitter with the said hypothecated subjects he is liable to pursuer in payment of the said rent.

The Sheriff-Substitute (Blair), sitting in the Small Debt Court, gave the following judgment:—

Jan. 16, 1922

Sheriff Blair

This case raises a question of considerable importance, and perhaps it is a pity that it comes up for decision in this Court. The facts are not in dispute, and are substantially accurate, as stated in the pursuer's claim. In addition to the facts there mentioned, it appears that the pursuer, being, no doubt, rightly of opinion that her best chance to sell the heritable property would be on the footing that the tenant should vacate the shop and house

at the same time, asked the tenant to vacate the premises. Mrs. Henry, the tenant, agreed to sell her business and stock for £100, and authorised the pursuer to advertise the business along with the heritable property. This was done by pursuer's solicitors, and the defender thereupon came along with an offer to purchase the heritable property. The pursuer's agents informed him that they could not negotiate with him for the sale of the property until he had settled with the tenant for the purchase of her business, and did so, no doubt, in order that there would be no difficulty as regards entry, in view of the Rent Restrictions Act.

These negotiations took place in October, 1921, and at that time naturally the rent due by Mrs. Henry to the pursuer for the half-year ending Martinmas, 1921, was still unpaid. The pursuer's agents, by informing the defender that he must settle direct with the tenant as regards her business, made it clear to him that they were not acting for the tenant, but only for the landlord, the present pursuer. The defender thereafter came to an arrangement with Mrs. Henry, the tenant, whereby he paid her £100 for the stock and the fittings of the shop, and obtained entry in her place as tenant on 28th October, 1921. The price was paid direct by the defender to the tenant, without any inquiry on his part as to whether the half-year's rent was paid, and it seems to me that if the defender had taken the prudent course of making this payment through his agent the latter would have seen that there was no prior charge on the tenant's stock which might fall on defender as the purchaser.

On the settlement day, 11th November, 1921, the pursuer's agents, having ascertained by this time that the tenant had gone without paying her rent, claimed from the defender's agent payment of the half-year's rent, along with the price of the heritable subjects. This was refused, and a letter in the following terms was then written by them to the defender's agent:—

"11th November, 1921."

"John M'Callum, Esq.,
"Solicitor,
"95 Bath Street, Glasgow.

"Dear Sir,
"*Rokeby, Anniesland.*

"With reference to the settlement of this transaction to-day, it is understood that the settlement is not to prejudice our client's rights as landlord or proprietor of the premises occupied now or formerly by Mrs. Henry, and that such rights of hypothec or otherwise are to remain in

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full force and effect as if such settlement had not taken place. Please confirm the terms of this letter.

"We are, yours faithfully,
(Sgd.) "G. H. Robb & Crosbie."

The defender's agent accepted the terms of this letter by the following docquet:—

"I confirm the terms of the above letter.
(Sgd.) "John M'Callum."

By the terms of this arrangement it seems to me clear that the pursuer's rights of hypothec were fully preserved, and these, according to well-established law, may be enforced at any time within three months after rent becomes due.

I am satisfied on the authorities that purchasers of hypothecated goods are liable either to return the goods or pay the amount of rent (Hunter on Landlord and Tenant, vol. ii., pp. 394-396, 390, 401; *Christie* v. *M'Pherson*, F.C. 1814, 95; *Stewart* v. *Peddie*, 2 R. 94).

It is admitted in this case that the value of the goods purchased exceeded the amount of rent sued for, and I accordingly grant decree for £7 10s., being the half-year's rent of the subjects, disallowing the item of £2 5s. for hire of fittings which were returned to the pursuer, and in respect of which no hypothec exists. Pursuer will naturally have the usual expenses.

For pursuer—Messrs. G. H. Robb & Crosbie, Glasgow.
For defender—Mr. John M'Callum, Glasgow.

No. 44.
Lanarkshire
Waugh v Baxter & Sons

John Waugh, *Pursuer;* Baxter & Sons, *Defenders.*

Process — Jurisdiction — Interponing authority to decree arbitral—Objections.—In an action to interpone the authority of Court to a decree arbitral and for payment of a sum found due under an arbitration award, the defenders pleaded that the award was *ultra vires* and invalid, and that the arbiter had no power to assess and award damages. *Held* that the Sheriff had no jurisdiction to try the questions raised in the defences (*Forbes* v. *Underwood*, 1886, 13 R. 465, applied).

The pursuer in this action was an apprentice joiner who, on attaining eighteen years of age during the war, joined H.M. Forces. On being demobilised he applied to the Ministry of Labour Training Department under the scheme applicable to apprenticeships interrupted by war service. The Ministry found him employment with defenders, but before his apprenticeship was completed his services were dispensed with,

whereupon he applied to the Ministry of Labour for the adjustment of his claim against his employers in respect of the failure of the latter to continue his employment until completion of his apprenticeship. The Ministry of Labour ultimately remitted the questions in dispute to Sheriff-Substitute Fyfe, who, after hearing evidence, held that the amount due by the defenders to the pursuer was £75, and issued a decree arbitral for that amount. The defenders having refused to pay the amount of the award, the pursuer raised an action in the Sheriff Court. The defenders pleaded, *inter alia*, that the award was *ultra vires* and invalid, and that the arbiter had no power to assess and award damages. The pursuer pleaded that the defences were irrelevant, and maintained that the Sheriff had no jurisdiction to entertain the defenders' objections. The Sheriff-Substitute (LEE) issued the following interlocutor sustaining the pursuer's plea to the relevancy of the defences:—

Feb. 3, 1922
Sheriff LEE

GLASGOW, *3rd February*, 1922.—The Sheriff-Substitute, having heard parties' procurators and considered the cause, finds that this Court has no jurisdiction to try the question raised in the defences; therefore sustains the third plea in law of the pursuer; before decerniture sists procedure for fourteen days to allow the defenders, if so advised, to raise an action in any competent Court to reduce the award founded on by the pursuer. B. P. LEE.

Note.—In this action the pursuer craves the Court to interpone its authority to a decree arbitral pronounced by Sheriff-Substitute Fyfe in a submission between the pursuer and the defenders, and to ordain the defenders to pay to the pursuer the sum of £75 in terms of the arbiter's award.

The defenders oppose this on various grounds, which are summed up in answer 9 of their pleadings. Their objections include (1) allegations that there was no valid reference to the arbiter, or at least that he has dealt in his award with a matter and a claim not included in the reference; (2) misconduct by the arbiter of the arbitration proceedings; and (3) that the arbiter has no power to assess damages. What I have now to consider is whether these objections constitute a relevant defence, or, to state the position more accurately, whether it is within the jurisdiction of this Court to entertain them.

For the purposes of considering this preliminary question, the defence must, I think, be regarded as twofold. It attacks both the authority and the conduct of the arbiter. I have no doubt that the Sheriff, before interponing

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authority to an award, is entitled to be satisfied of the arbiter's authority to issue it, and therefore may properly deal with the objection that there was no valid reference. But the defenders admit that there was a reference to the arbiter, and that they were a party to it. Under this reference the arbiter had authority to decide in a dispute which had arisen between the pursuer and the defenders. The defenders admit in answer 7 that the arbiter accepted the reference, fixed a diet for hearing the case, and, following upon said diet, issued his award. In my opinion the admission that the arbiter had authority to act, and to issue an award binding on the defenders, disposes, so far as I am concerned, of the first line of defence. How the authority was exercised, including the arbiter's interpretation of its extent, and the question whether he misdirected himself as to the terms of reference or the compatibility of his award, is a matter of conduct which, I think, I have no jurisdiction to consider.

The case of *Forbes* v. *Underwood*, 22nd January, 1886, 13 R. 465, was one in which, after arbiters failed to agree, one of the parties presented a petition in the Sheriff Court of Inverness against one of the arbiters and the other party to the reference, asking that this arbiter should be ordained to concur in executing a minute of devolution of the reference upon the oversman. On appeal it was held that the Court of Session alone has jurisdiction to compel an arbiter to proceed, and the action was dismissed. The Lord President (Inglis) stated very fully the law applicable to the question of jurisdiction which I am now called on to consider, and, as far as I am aware, his statement has ever since been accepted as authoritative. "The position of an arbiter is very much like that of a judge in many respects, and there is no doubt whatever that whenever an inferior judge, no matter of what kind, fails to perform his duty, or transgresses his duty, either by going beyond his jurisdiction, or by failing to exercise his jurisdiction when called upon to do so by a party entitled to come before him, there is a remedy in this Court, and the inferior judge, if it turns out that he is wrong, may be ordered by the Court to go on and perform his duty. . . . Now, all this belongs to the Court of Session as the supreme civil Court of this country in the exercise of what is called, very properly, its supereminent jurisdiction. . . . Of one thing there can be no doubt, that in making such orders against inferior judges . . . this Court is exercising an exclusive jurisdiction—a jurisdiction which cannot possibly belong to any other Court in this country." Then he goes on to state that this rule, applicable to all inferior judges, applies equally to the case of an arbiter, whose

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decree has been placed by the Act of Regulation of 1695, sec. 25, "quite in the same position as if it had been the decree of a judge."

I am accordingly of opinion that no defence has been stated which I have jurisdiction to entertain. If the defenders have ground of complaint, they must seek their remedy elsewhere by substantive action for the reduction of the award. I do not think that it is unreasonable that this action should be sisted to give them an opportunity of still taking this course, though they have not stated any good reason for not having done so sooner. In *Nivison* v. *Howat*, 22nd November, 1883, 11 R. 182, the jurisdiction of the Sheriff does not appear to have been challenged. There is nothing in either the decision or the opinions of the judges, to suggest that the pursuer's application to the Sheriff required the defenders to maintain an incompetent defence instead of proceeding at once with their proper remedy. B. P. L.

For pursuer—Mr. DAVID DALLAS, Glasgow.
For defenders—Mr. W. B. BENNETT, Glasgow.

No. 45.
LANARKSHIRE
Fletcher, &c. *v* Wheeler

GAVIN FLETCHER and Another, *Appellants;* WELBY WHEELER, *Respondent.*

Franchise—Representation of People Act, 1918—*Election (Scotland) (Corrupt and Illegal Practices) Act*, 1890.—*Held* that the statutory provision prescribing a period of five days for appealing against a registration officer's decision to expunge a voter's name from the voters' roll in respect of the voter's conviction of a corrupt practice is peremptory and, accordingly, that an appeal taken after expiry of the five days was incompetent.

The facts of this appeal are sufficiently detailed in the statement submitted by the registration officer to the Court, as follows:—

1. The appellants were registered as Parliamentary and local government electors in the burgh of Airdrie in the register made up by me in the autumn of 1921.

2. The appellants were candidates in the municipal election on 1st November, 1921, of two town councillors for the second ward of the burgh of Airdrie and, as such, used for the purpose of promoting their election, as a committee room, a room within the premises at 165 Chapel Street, Airdrie, occupied by Michael Sands, restaurant keeper, where refreshments were ordinarily sold for consumption on the premises contrary to the Election (Scotland) (Corrupt and Illegal Practices) Act, 1890, sec. 20 (1) (*a*) whereby each was liable to a fine not exceeding £100, and in default of payment to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, sec. 48, and to be declared

incapable during a period of five years from the date of conviction of being registered as an elector or voting at any election held for or within said burgh.

3. On 13th January, 1922, the appellants were convicted of said contravention and fined £1 each, which fines were paid at the bar. An extract of the convictions is produced.

4. On 1st March, 1922, I sent to each of the appellants a notice that in consequence of said convictions I proposed to expunge their names from the register, and that if they objected to the deletion of their names they would have an opportunity on 10th March, 1922, at a meeting to be held in the Council Chamber, Municipal Buildings, Airdrie, at 11 o'clock forenoon of

(*a*) Objecting to such correction of the register;
(*b*) Being heard with respect thereto; and
(*c*) Making a statement to show cause why their names should not be expunged from the register.

Copies of the notices are produced.

5. On 10th March, 1922, both appellants attended said meeting and objected to the expunging of their names from the register on the ground that the convictions did not carry any sentence preventing their names from being registered.

6. I did not consider the appellants' ground of objection sufficient to justify me in retaining their names on the register, assuming I had power to do so.

7. Accordingly on 10th March, 1922, by registered letters, I intimated to the appellants that their names would be expunged from the register. Copies of the notices are produced.

8. Under reference to sec. 14, schedule 1, sec. 29 of the Representation of the People Act, 1918, the appellants on 17th March, 1922, notified me that they appealed against my decision. As the notices of appeal were not sent to me within the statutory period of five days I deem it my duty to bring the question of the competency of the appeals to the notice of the Court. The notices of appeal are produced along with the registered envelopes.

9. My decision to expunge the appellants' names from the register is based on these grounds, viz. (1) that it is doubtful whether I had any power to retain the appellants' names on the register, the discretion, if given at all, being merely given by implication in sec. 29 of the Corrupt and Illegal Practices Act, 1890; and (2) that, in the whole circumstances, I deemed it to be my duty to allow the Court which imposed the convictions to decide whether these should involve the expunging of the appellants' names from the register.

10. As both appeals are based on similar grounds they

are combined in this statement, and the decision of the Court will rule both.

At the hearing of the appeal by the Sheriff-Substitute on 28th March, 1920, the respondent's agent referred to *Summer*, 5 R. 863, and *Millom Hematite Company* v. *Simpson*, 14 Sh.Ct.Rep. 206.

The Sheriff-Substitute (MacDiarmid) issued the following interlocutor:—

March 28, 1922
Sheriff MacDiarmid

Airdrie, 28*th March*, 1922.—The Sheriff-Substitute, having heard parties' procurators on the appeals of Gavin Fletcher and Alexander Bunting against the decision of the registration officer, finds in fact that the said decision was given on 10th March, and notice of appeal against it on 17th March, 1922, and in law that said notice of appeal was not timeous: therefore dismisses the appeal.

D. S. Macdiarmid.

Note.—By rule 1 of schedule 1 of the Representation of the People Act, 1918, it is provided that a person desiring to appeal against the decision of a registration officer must give notice of appeal when the decision is given, or within five days thereafter. Admittedly, the notice here was not given timeously. The rule appears to be peremptory, and I am therefore of opinion that this appeal is incompetent.

D. S. M.

For appellants—Mr. E. Rosslyn Mitchell, Glasgow.
For registration officer—Mr. J. A. Reid, Airdrie.

SHERIFF COURT OF MIDLOTHIAN.

No. 46.
Midlothian
Lyle & Wallace v M'Kechnie

Lyle & Wallace, *Pursuers;* William M'Kechnie, *Defender.*

Process—Remit—Procedure.—Circumstances in which objections to the report of a chartered accountant, to whom remit had been made of consent of parties, *repelled*. *Observations* with regard to reporter's duty.

The pursuers sued the defender, who, they averred, had been their cashier and bookkeeper, for the sum of £101 16s. 11½d., which, they alleged, was due by him to them. After the record was closed and parties had been heard, the Sheriff-Substitute, of consent of parties, remitted to a chartered accountant in Edinburgh "to examine the process and the pursuers' books, and, after hearing the parties or their agents in presence of each other, to fix the amount, if any, appearing from said books of the pursuers as owing by defender to pursuers, and to report, reserving to the parties all questions of law which may arise on said report."

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The reporter carried through the remit and lodged his report, to which the defender lodged objections, on the ground, *inter alia*, that he had not heard parties or their agents in presence of each other. The subjoined interlocutors show how the Sheriff-Substitute (Orr) dealt with the matter:—

Oct. 11, 1921
Sheriff Orr

Edinburgh, 11*th October*, 1921.—The Sheriff-Substitute, having heard parties' procurators on the report by Mr. Wallace (No. 11 of process), the minute of objections thereto for defender (No. 12 of process), and answers for pursuers (No. 18 of process), remits the process to the reporter, D. E. Wallace, Esq., C.A., Edinburgh, and appoints him to report further to the Court, in view of the statements in the minute (No. 12 of process) and answers (No. 18 of process) whether the parties or their agents were heard by him in presence of each other. R. L. Orr.

Note.—The minute for defender and answers for pursuers, which have been lodged following upon the report by the accountant to whom the remit was made, seem to contain matter which calls for further inquiry. The remit was, in terms of the interlocutor of 19th October, 1920, "to examine the process and the pursuers' books and after hearing the parties or their agents in presence of each other to fix the amount, if any, appearing from said books of the pursuers as owing by defender to pursuers." The remit was of consent of parties.

Defender now states in his minute that the reporter failed to hear the parties or their agents in presence of each other as directed. Pursuers in their answers appear to admit that this is so, but they say the objection has no force as the parties did not desire to be heard. This is in conflict with the reporter's own statement, which is to the effect that he "heard the parties or their agents in presence of each other." The result is that the matter is left in an unsatisfactory position. Before anything further is done I think it right to give the reporter an opportunity of considering the minute and answers and making a fuller statement to the Court of what took place under the remit if he so desires. R. L. O.

March 15, 1922
Sheriff Orr

Edinburgh, 15*th March*, 1922.—The Sheriff-Substitute, having heard parties' procurators and considered the cause with the reports by Mr. D. E. Wallace, C.A., Edinburgh (Nos. 11 and 22 of process), finds in terms of the report (No. 11 of process) that defender is owing to pursuer the sum of £101 16s. 11½d.; grants decree against the defender for payment thereof to the pursuer, with interest as craved; finds the defender liable to the pursuer in expenses, and

remits to the Auditor of Court to tax the same, and to report.

R. L. ORR.

Note.—It is objected for the defender that the reporter has not carried out the remit made to him, and that in particular he did not hear the parties in presence of each other.

I am of opinion that those objections are not well founded. In the first place the reporter's duty was to examine the process and the pursuers' books. This he did carefully, referring to members of pursuers' staff for information on points that needed clearing up. All this was for the purpose of informing his own mind in the first place; it did not need to be done in the presence of the parties, and I see nothing objectionable in the reporter asking information from those who were familiar with pursuers' business and books. The next thing was that it was then the reporter's duty to hear the parties or their agents in presence of each other. According to the report No. 22, the reporter had before him on the afternoon of 25th November, 1920, both sides, the defender and also Mr. Swan as representing pursuer, Mr. Wallace. Swan and not Mr. Wallace himself was the person who was familiar with the matter, having acted as cashier to pursuers' firm.

At that meeting the whole subject was gone over, the defender learned the reporter's view as to the entries in the various books and the balances brought out; matters were gone into "in considerable detail." It is clear defender had then an opportunity in the presence of the other side of stating any objections or offering any explanations which he desired. But the reporter states that he "distinctly expressed himself as thoroughly satisfied with the explanations given him by me as to the way the various books had been balanced off and the balances brought out." That appears to me to be conclusive. It is impossible to say the reporter did not hear whatever the defender desired to say in presence of the other side.

Still later the pursuer, Mr. Wallace himself, met the reporter in the presence of the defender. Here was a second opportunity given to defender to raise any point he chose, but he indicated no wish to do anything of the sort.

I think full justice has been done to the defender and that the reporter has fairly and fully carried out the remit. I shall accordingly give decree for the sum fixed by him in the report No. 11, namely, £101 16s. 11½d.

R. L. O.

For pursuers—Mr. JOHN MACKAY (Messrs. Mackay & Young), Edinburgh.
For defender—Mr. DUGALD MACLEAN, Edinburgh.

No. 47.
Midlothian
Clark v Scottish Amicable Assurance Society, &c.

Mrs. Esther Thomson or Clark, *Pursuer;* Scottish Amicable Assurance Society, *Arrestees;* and Donald Clark, *Common Debtor.*

Diligence—Arrestment—Policy of life assurance—Furthcoming—Procedure.—The pursuer, who held a decree against the common debtor, arrested the contents of a policy of insurance on his life, and followed this up with an action of furthcoming. *Held* that the action was competent; and, surrender of the policy being more advantageous than selling it, the arrestees were ordained to lodge an actuarial certificate of surrender value, ordained to consign the ascertained surrender value; and were thereupon exonered and discharged.

In this case the pursuer averred that she had obtained in the Court of Session a decree for interim aliment against the common debtor, her husband, now in Salonica, and that she had laid arrestments in the hands of the arrestees which had attached the amount payable under a policy of life assurance for £1000 on the life of the common debtor with the arrestees. She now brought this action of furthcoming to make good the arrestments by the sale or surrender of the policy. The action was served upon the common debtor edictally, but no appearance was entered for him. The arrestees entered appearance and lodged defences. The pursuer pleaded (2) the defence stated, being irrelevant, falls to be repelled, and the arrestees pleaded (1) the action is incompetent, and should be dismissed; (2) *separatim,* in respect that the pursuer's crave is not warranted by the arrestments referred to, or by the claims alleged by her against the said policy, and could not be granted without prejudice to these defenders (the arrestees), the action should be dismissed; (3) the pursuer's averments being irrelevant and insufficient to support the conclusions of the initial writ, the action should be dismissed; (4) the pursuer's averments so far as material being unfounded in fact, these defenders are entitled to absolvitor; (5) no funds belonging to the common debtor having been in the hands of these defenders at the date of said arrestments or having been attached thereby, these defenders should be assoilzied; and (6) in any event, these defenders should be found entitled to expenses as a first charge on any fund attached in their hands or realised in the present proceedings.

After a discussion in the debate roll, the pursuer

was allowed to amend the crave of the writ, which thereafter was in the following terms:—

(First) to find and declare (*a*) that under a policy of life assurance, No. 61060, granted by the defenders, the said Scottish Amicable Life Assurance Society, in favour of the defender, the said Donald Clark, the latter and his representatives have right to payment of a sum of one thousand pounds sterling, with bonus additions, at the date of his death on payment of the premiums therein stipulated; (*b*) that the pursuer has lawfully arrested the contents of said policy and the rights and interests of the said Donald Clark therein to the extent of seventy pounds sterling, more or less, conform to two executions of arrestment to be produced in the process to follow hereon; and (*c*) that the pursuer is entitled to have made furthcoming to her the contents of the said policy and the right and interest of the common debtor, the said Donald Clark therein to the extent of the sums arrested as aforesaid, and that by means of the said policy being surrendered or sold; (second) and upon it being so found and declared, to surrender, or to grant warrant and authority to the pursuer to surrender, the common debtor's right and interest in said policy without delivery to the arrestees of the said policy, and that for such sum as may be fixed by a certificate under the hand of the actuary of the said society, or as may be otherwise ascertained by the Court to be the full surrender value thereof in accordance with the rules and regulations of said society; and thereafter on such surrender having been made, to ordain the arrestees to make payment to the pursuer out of said surrender value, of (*a*) the sum of twenty-five pounds sterling, being one month's aliment, payable by the common debtor to the pursuer, on first November, nineteen hundred and twenty-one, for the said month of November, conform to decree for interim aliment pronounced in the Court of Session, dated eighteenth October, and extracted fifteenth November, both in the year nineteen hundred and twenty-one, in an action of separation and aliment at present depending therein at the instance of the present pursuer against the present common debtor; (*b*) the sum of twenty-five pounds sterling, being the aliment payable by the common debtor to the pursuer on first December, nineteen hundred and twenty-one, for the said month of December, conform to said decree of interim aliment; (*c*) the expenses of the arrestments used by the pursuer in execution of said decree of interim aliment as the same may be taxed; and (*d*) the expenses of the process to follow hereon, as the same may be taxed; further, to ordain the arrestees to retain in their hands the balance

of said surrender value, if any, after said payments, as the property of the common debtor, and subject to his acts and deeds and the further diligence of the pursuer or his other creditors, or to ordain the arrestees to consign the whole surrender value in the hands of the Clerk of Court, and to grant warrant for payment to the pursuer out of this sum of the sums before mentioned, the balance to remain in the hands of the Clerk of Court; and upon said payments or consignation having been made, to hold the said policy of assurance as surrendered and the arrestees discharged of all claims in respect thereof, subject only to their liability in respect of the sum retained as aforesaid; or otherwise (third) to appoint the said policy of life assurance and the common debtor's right and interest therein to be sold by public roup, after due advertisement, at the sight of the Clerk of Court or such other person as may be named by the Court as judge of the roup, and that at such upset price as may be fixed by the Court and on articles of roup to be settled and adjusted by the said Clerk of Court or such other person; to grant warrant and authority to the said Clerk of Court or such other person as may be named by the Court to execute a disposition or assignation of the said policy of life assurance and the common debtor's right and interest therein in favour of the purchaser, and to find and declare that such disposition or assignation shall be as valid and binding on the arrestees and common debtor as if granted by the common debtor himself, and to exoner and discharge the arrestees of all claims in respect of said policy of life assurance at the instance of the common debtor or any one claiming through him; to appoint the proceeds of the sale under deduction of the expenses of the sale to be consigned with the Clerk of Court to await the further orders of Court; to grant warrant to the Clerk of Court to pay to the pursuer, out of the free proceeds of the sale, the sums before mentioned; to appoint the balance of said proceeds, if any, to remain in the hands of the Clerk of Court as the property of the common debtor, and subject to his acts and deeds and the further diligence of the pursuer and his other creditors; and (fourth) to find the common debtor liable in expenses in any event and the arrestees liable in expenses only in the event of their opposing the crave of this writ.

Authorities cited by pursuer—*Bernhardt's Trustees* v. *Scottish Amicable Life Assurance Society and Another*, 1871, 9 M. 443; *Strachan* v. *M'Dougle*, 1835, 13 S. 954; Sheriff Fyfe's Sheriff Court Forms; Policy of Assurance Act, 1867, sec. 3; Macgillivray on Life Assurance, pp. 410, 411,

412, and 502. Pursuer also referred to the practice of the Sheriff Court of Midlothian, in which several similar actions had been entertained.

Authorities cited by arrestees—*Ingram Johnston* v. *Century Insurance Company, Limited*, 1909, S.L.R. 746.

The Sheriff-Substitute (ORR), by the interlocutor of 8th March, 1922, appended hereto, sustained the pursuer's plea to the relevancy of the defences for the arrestees, and repelled the first, second, and third pleas in law for the arrestees, and also pronounced the interlocutor of 10th March, 1922, ordaining the arrestees to consign the surrender value of the policy. Before implement of the latter interlocutor, a reponing note was lodged for the common debtor, in which he stated as his proposed defence that "he is prepared to pay the sums due under the arrestments in the said action, or to concur in a sale of the policy of insurance arrested in the hands of the other defenders."

The following are the principal interlocutors pronounced in the cause, and sufficiently show how it and the reponing note for the common debtor were disposed of, and the procedure:—

March 8, 1922
Sheriff ORR

EDINBURGH, 8*th March*, 1922.—The Sheriff-Substitute, having heard counsel for the parties and considered the cause, repels the first, second, and third pleas in law for the defenders and sustains the second plea in law for the pursuer; finds and declares on terms of the first conclusion of the crave of the writ; finds further that, having regard to the circumstances of the present case, it is more advantageous to surrender the policy of life assurance than to sell it; appoints the defenders to lodge in process within three days from this date a certificate under the hand of their actuary or other responsible official stating the present surrender value of said policy of assurance; *quoad ultra* continues the cause. R. L. ORR.

Note.—The amended crave will, I think, make it possible to satisfy the pursuer's claim and at the same time fully to safeguard the interests of the defenders. It is evident that in the circumstances a sale of the policy would be difficult or impossible. The first step will be to ascertain the surrender value; that sum subject to any claims of defenders will be consigned in the hands of the Court and the defenders discharged. R. L. O.

March 10, 1922

EDINBURGH, 10*th March*, 1922.—The Sheriff-Substitute, having resumed consideration of the cause, with the certificate (No. 22 of process) by the arrestees' actuary that the present

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surrender value of the policy of life assurance in question amounts to £280, surrenders the said policy and the common debtor's right and interest therein without delivery to the arrestees of said policy, and that for the said sum of £280; ordains the arrestees to consign said sum of £280 in the hands of the Clerk of Court within seven days from this date, and on this being done holds the said policy as surrendered and exoners and discharges the arrestees thereof and of all claims in respect of said policy at the instance of the common debtor or any one claiming through him; *quoad ultra* continues the cause. R. L. Orr.

March 15, 1922

Edinburgh, 15*th March*, 1922.—The Sheriff-Substitute, having seen the reponing note for the defender, Donald Clark, now lodged (No. 23 of process), appoints said defender to intimate a copy thereof and of this interlocutor to the pursuer, and to the other defenders or to their respective known law agents, and appoints parties to be heard within the Sheriff Court House, Edinburgh, on Friday, 17th March, 1922, at 11 a.m R. L. Orr.

March 31, 1922

Edinburgh, 31*st March*, 1922.—The Sheriff-Substitute, having resumed consideration of the reponing note for the defender, Donald Clark, the common debtor, and heard parties' procurators thereon, refuses the crave of said reponing note and grants warrant to the Clerk of Court to pay to the pursuer or her agent the sum of £2 consigned by said defender. R. L. Orr.

Eo die.—Consigned by Messrs. Thomson, Dickson & Shaw, W.S., Edinburgh, agents for the arrestees the sum of Two Hundred and Eighty Pounds Sterling. (£280.)

Andw. Harrison,
Sheriff-Clerk.

Eo die.—The Sheriff-Substitute, having resumed consideration of the cause, and the arrestees having now consigned in Court the sum of £280, being the surrender value of the Policy of Life Assurance referred to in the writ, and having heard parties' procurators on the question of expenses, holds said policy as surrendered and exoners and discharges the arrestees of all claims in respect thereof at the instance of the common debtor or any one claiming through him; finds that the pursuer is entitled to payment out of the consigned money of the sums of £25, and £25 specified in heads (*a*) and (*b*) of the (second)crave of the writ; grants warrant to the Clerk of Court to pay to the pursuer or her

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agent the said sums of £25 and £25 referred to in said heads (*a*) and (*b*) of the (second) crave; finds the common debtor liable to the pursuer in the expenses incurred by her in laying on the arrestments used by her and to the expenses incurred by her in the cause, and that she is entitled to payment thereof under heads (*c*) and (*d*) of the (second) crave of the writ out of the sum consigned with the Clerk of Court; allows an account of said expenses to be given in and remits the same when lodged to the Auditor of Court to tax, and to report; finds the arrestees entitled out of the sum consigned, to the expenses incurred by them in the cause, as modified; modifies and fixes these at the sum of £10 10s. and grants warrant to the Clerk of Court to pay the same out of the consigned money to the arrestees or their agent; *quoad ultra* finds no expenses due to or by either party. R. L. ORR.

For pursuer—Mr. J. ANDERSON MACLAREN, advocate, instructed by Mr. W. Marshall Henderson, Edinburgh.
For arrestees—Mr. A. P. DUFFES, advocate, instructed by Messrs. Thomson, Dickson, & Shaw, Edinburgh.
For common debtor—Mr. PETER CLARK, Edinburgh.

SHERIFF COURT OF PERTHSHIRE.

No. 48.
PERTHSHIRE
Macpherson v Stewart

LACHLAN MACPHERSON, *Pursuer;* DONALD STEWART, *Defender.*

Sale—Horse—Warranty—Rejection.—A horse was sold on three days' trial under warranty that it was "fit for all farm work, free from vice, and pass all road traffic." *Held* that, as the horse refused to pass under railway bridges when drawing a coal cart and attempted to bolt when passed by a motor car, and also bolted a short distance along the road towards some young horses, it was disconform to warranty.

The pursuer raised an action for the price of a horse sold to the defender on the warranty that it was "fit for all farm work, free from vice, and pass all road traffic." The defender was allowed three days' trial. Within that period he rejected the horse as unsuitable. It was submitted for the pursuer that the alleged defect on the part of the horse was not covered by the warranty. The facts are more fully set forth in the following interlocutors:—

Jan. 27, 1922
Sheriff BOSWELL

DUNBLANE, 27*th January*, 1922.—The Sheriff-Substitute, having considered the unrecorded proof with the process and production, finds in fact (1) that the horse in question was sold under warranty (No. 6 of process)

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and no other; (2) that before sale to the defender he was not disconform to warranty; (3) that on the day of sale and after warranty the defender asked for a "three days' trial" and the pursuer assented; (4) that on a day within the trial period the horse, while drawing a coal cart on a public road, gave the defender much trouble by at first refusing (on four occasions) to enter railway bridges, being led with difficulty into them, and then bolting through; (5) that on the same journey a motor car passed from behind him and he attempted to bolt; (6) that on the same journey he bolted a short distance along the road towards some young horses; (7) that on the first two days in the defender's stable he was noisy and troublesome, sitting on his hind legs and putting his feet in the manger; (8) that within the days of trial the defender rejected him on the ground that he was "not suitable" and sent him to the Dreadnought Hotel stables; (9) that while being sent there he again made exactly the same trouble in going through a railway bridge, and was only got through with the aid of a passer-by, and after being blindfolded with a coat; (10) that in the hotel stables he behaved exactly as in finding 7 hereof, and in addition broke his rope or chain twice, but after the first day became quiet; (11) that after his return he has been quiet in stable, passes through railway bridges without trouble, and is not vicious; and (12) that the pursuer did not agree to accept £5 as a "rue bargain" or to make any settlement of this case with the defender or any one on his behalf: Finds in law (1) that drawing a coal cart is not "farm work within the meaning of the warranty; (2) that the trouble given in stable and in passing through bridges did not amount to vice; (3) that the horse was conform to warranty in all respects; (4) that the agreement for three days' trial must be taken to have meant that the defender was to have three days in which to test the warranty, and that therefore the defender was not entitled to reject the horse and is resting-owing in the price: therefore repels the pleas in law for the defender, sustains the first two pleas in law for the pursuer, decerns in terms of the crave of the initial writ and grants warrant to the defender to uplift the sum consigned in the hands of the Clerk of Court; finds the defender liable to the pursuer in expenses, allows an account to be given in and remits the same when lodged to the Auditor to tax on the lower scale, and to report. C. P. Boswell.

Note.—On the three days' trial the case is ruled by *Cranston* v. *Mallow*, 1912, S.C. 112, from which I am unable to distingush it.

In my opinion the nerves of this young horse were upset

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by subjecting it to too many difficulties one after another (*Thomson* v. *Miller*, 21 D. 726, and *Wilson* v. *Turnbull*, 23 R. 714). The fact that it had just been separated from other young horses accounts for its remaining peculiarities. The warranty appears to make a distinction between farm work and road work. The supposed settlement was a misunderstanding of a usual kind.

It was common ground that if decree were given the defender was to uplift the consigned sum.

Warranty "to drive" cannot be stretched to cover the horse's conduct at railway bridges, for a warranty is strictly and literally constructed as meaning no more and no less than it says. C. P. B.

April 1, 1922
Sheriff SANDEMAN

DUNBLANE, 1*st April*, 1922.—Having heard parties and considered the cause, alters the interlocutor of the Sheriff-Substitute of date 27th January, 1922, by recalling the findings in law, and, in lieu thereof, finds that, in respect of the conduct narrated in findings in fact Nos. 4, 5, and 6, the said horse was disconform to warranty; therefore assoilzies the defender and decerns; grants warrant to the pursuer to uplift the sum consigned in Court; finds the pursuer liable to the defender in expenses of the cause and of the appeal; allows an account thereof to be given in; remits the same when lodged to the Auditor to tax, and to report; and remits the case to the Sheriff-Substitute.

CONDIE SANDEMAN.

Note.—I cannot think that a horse which, while pulling a cart along a road, refuses to pass under railway bridges, attempts to bolt when passed by a motor car, and bolts when it sees young horses, complies with a warranty that he is fit for "all farm work and pass all road traffic." It is an incident of farm work that a cart should be sent to the station with farm produce or for goods. I cannot attribute to the horse knowledge that the cart he drew when on his trials contained coal; but, if he did, I think that farmers may well be expected to use coal for a variety of strictly agricultural purposes. A horse that won't pass under railway bridges is not broken for the uses of ordinary roads. It may be that the horse was temporarily nervous; but the defender had to make up his mind inside the three days allowed. C. S.

For pursuer—Mr. ALEX. PATERSON, Stirling.
For defender—Mr. DONALD M'LAREN, Callander.

SHERIFF COURT OF LANARKSHIRE.

No. 49.
Lanarkshire
Devlin v Bargeddie Coal Co., Ltd.

Francis Devlin, *Pursuer;* The Bargeddie Coal Company, Limited, *Defenders.*

Workmen's Compensation Act, 1906, *Schedule I., sec.* 15—*Medical reference — Examination—Workman's refusal to submit for examination*—A minute under Schedule 1, sec. 15, of the Workmen's Compensation Act, 1906, was lodged with the sheriff-clerk at Airdrie, who referred the matter to one of the medical referees appointed by the Secretary of State. The workman, on receipt of the notice from the sheriff-clerk, wrote to his mandatory, who signed the minute of reference, stating that he would not consent to any medical referee in his case, and, on receipt of the intimation from the medical referee requesting him to attend for examination, forwarded it to said mandatory, stating that he "refused to do any such thing," and did not attend for examination. In an application, following said minute of reference, for an award of compensation, *held* that, until such examination had taken place, the workman's right to compensation and to take or prosecute any proceeding under the said Act, including the present proceedings, fell to be suspended.

The interlocutor of the Sheriff-Substitute (Macdiarmid) fully explains the case:—

Dec. 12, 1921
Sheriff Macdiarmid

Airdrie, 12*th December*, 1921.—The Sheriff-Substitute, having heard parties' procurators and considered the cause, finds in fact (1) that on 30th March, 1921, the pursuer, who is a miner, was injured by accident arising out of and in the course of his employment with the defenders; (2) that he was totally incapacitated; (3) that the defenders admitted liability, and paid him compensation at the full rate in respect of said incapacity from said date to 15th June, 1921; (4) that at said latter date the defenders ceased to pay said compensation on the ground that the pursuer was then capable of light work, and in respect of partial incapacity offered compensation at the rate of 10s. per week; (5) that the pursuer, however, declined said offer, maintaining that he was still totally incapacitated; (6) that a correspondence ensued between Mr. W. M. Small, of the Lanarkshire Mineworkers' Union, on behalf of pursuer, and Mr. Craig, the law agent of the Mineowners' Association, on behalf of the defenders; (7) that on 12th July, 1921, the pursuer granted the following written authority to Mr. Small:—"Workmen's Compensation Act, 1906—Cadzow Street, Hamilton, 12th July, 1921.—

I, Frank Devlin, sen., residing at 51 High Street, Airdrie, hereby authorise W. B. Small, of the Lanarkshire Mineworkers' Union, to represent me, or to sign any documents on my behalf, in connection with my claim for injury sustained by me in the course of my employment with Bargeddie Coal Company on 30th March, 1921,—Signed, Frank Devlin"; (8) that the defenders, by their law agent, having on 15th July offered to refer the question of the pursuer's capacity to a medical referee, Mr. Small, on 18th July, wrote in answer as follows:—"I have your letter of 15th inst. This man is agreeable to have his case decided by a medical referee, and I shall be pleased to have copies of your doctor's report, so that the reference may be duly arranged"; (9) that while the pursuer had expressed himself as against a reference of his case to a medical referee, he had subsequently, and before Mr. Small wrote the letter quoted, agreed, after discussion with Mr. Small, to leave the matter entirely in his hands, to do what was best in his interests; (10) that the usual minute for the parties was thereafter signed by Mr. Small and by Mr. Craig and lodged with the sheriff-clerk, along with the above-quoted authority, and that the usual procedure followed; (11) that, on receipt of the sheriff-clerk's notice, the pursuer, on 27th July, wrote the following letter to Mr. Small:—"I already told you I would not consent to any medical referee in my case; you can put it into Court at once"; and again, on receiving notice from the medical referee to attend on 1st August, the following letter:—"28th July, 1921.—I am enclosing herewith a form of notification received here requesting that I should present myself at 4 Somerset Place, Charing Cross, Glasgow, on Monday, the 1st day of August, 1921, for medical examination; it is unnecessary for me to repeat my statement in a previous letter to you by saying that I absolutely refuse to do any such thing. You can therefore transmit this document to whom you may think it necessary to do so"; (12) that the pursuer did not attend the said diet fixed by the medical referee, and that these proceedings were subsequently raised; in these circumstances, finds that the said minute was signed with the authority of the pursuer, and was therefore an application in the sense of paragraph 15 of the First Schedule, and that the pursuer refused to submit himself for examination by a medical referee, to whom the matter had been referred; therefore suspends his right to compensation and to take or prosecute any proceedings under the said Act, including these proceedings, until such examination has taken place; finds the

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pursuer liable to the defenders in expenses; allows an account thereof to be lodged, and remits the same when lodged to the Auditor of Court to tax and to report.

D. S. Macdiarmid.

Note.—This workman was totally incapacitated by accident in March, 1921, and his employers admitted liability and paid him compensation from its date to 15th June, 1921. They then stopped, on the ground that total incapacity had ceased. The workman maintained that it had not, and in this process seeks an award of compensation at the full rate. A preliminary defence is stated by the employers. They plead that parties having, under Schedule I., paragraph 15, applied to the Court to have the matter referred to a medical referee, and the matter having been so referred, the workman thereafter refused to submit himself for examination, and that accordingly his right to compensation and to prosecute any proceedings under the Act, including these proceedings, ought to be suspended until such examination has taken place.

Now, it is common ground between the parties that an application was made to the Court in terms of the above-mentioned paragraph, and that the workman did not in fact present himself for examination at the diet fixed by the medical referee. What actually did occur is fully stated in the findings in fact, and the question for decision, as it appears to me, is whether or not the application was made by both parties. In other words, did Mr. Small sign the application with the workman's authority, and was it competent for him to sign it? If the answer is in the affirmative, it appears to me that in law it must be held that the workman refused, as he did in fact, to submit himself for examination. The workman's case is that throughout the negotiations with the employers—in which Mr. Small was undoubtedly acting for him—he made it clear to Mr. Small that he wanted his case "to be decided by the Sheriff," and that he would not consent to a reference to a medical referee. He gives no reason for his aversion from going to a medical referee, but simply takes up the above position. The letters quoted in the eleventh finding seem to lend colour to the contention that this was indeed the workman's attitude; but, on a consideration of the whole evidence, it seems to me to be established that in fact the workman agreed to leave his case in Mr. Small's hands, to do the best he could for him in all the circumstances. The considerations which lead to this conclusion are, as it seems to me, the following:—There is no doubt that Mr. Small was acting on behalf of

the workman in the negotiations with the employers. It was, in short, the usual case, of which there are numbers in this Court, and I suppose very much larger numbers settled out of Court, in which the Lanarkshire Mineworkers' Union is acting on the one and the employers' association on the other side. It is equally clear that on 12th July the workman granted Mr. Small the written authority quoted in the eleventh finding. It is therefore not difficult to conclude, and, indeed, is not disputed, that Mr. Small was in fact acting for the workman " in connection with my claim for injury sustained by me in the course of my employment with the Bargeddie Coal Company." And the workman's contention really comes to this, that Mr. Small's authority did not extend to cover one specific method by which the workman's claim might be adjudicated. It is, I think, not in doubt that this workman was difficult to deal with, and that he had expressed to Mr. Small his determination not to go before a medical referee, but subsequently, after various conversations, he was brought—at least temporarily—to see reason, and agreed, as I have said, to leave the matter in Mr. Small's hands. Immediately thereafter we have Mr. Small writing to the employers' law agent the letter quoted in the eighth finding. That letter is, I daresay, in itself conclusive of nothing further than Mr. Small's belief that the workman in fact agreed to a reference to a medical referee, but, taken in conjunction with the fact that the written authority of 12th July, whether granted before the conversations or after—a fact which is not clearly brought out by the evidence—was in general terms, seems to me, with Mr. Small's oral evidence to establish the fact that the workman did not at this the crucial time except from his authority the particular method of bringing the case to a decision in question. I am accordingly of opinion that Mr. Small signed the minute of parties with the authority of the workman.

That being the state of the facts, it seems to me that it was competent for Mr. Small to sign the minute of parties. His authority was " to represent " the workman and to sign " any documents " on his behalf in connection with his claim. It was said that the written authority was in truth only an authority to conduct an arbitration under the Act. On the face of it, that does not seem to me to be arguable, but, granted for the moment that it were so, it seems to me that the procedure here in question just amounted to the conduct of an arbitration. The Act of Sederunt of 26th June, 1907, provides by para-

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graph 1 that a "a party to any arbitration under the Act may appear or be represented . . . (*c*) Where written authority from him is produced, by . . . any other person"; and by paragraph ix., that an application under paragraph 15 of the First Schedule shall be made by minute, and that such minute having been duly intimated, shall be disposed of summarily, as if it were an application for settlement by arbitration under the Act"; while Part II. of the regulations of 27th June, 1907, seems to lend additional countenance to the view that a reference to a medical referee under paragraph 15 of the First Schedule is an arbitration, for paragraph 10 provides that the medical referee shall, in addition to examining the workman, "consider any statements that may be made or submitted by either party."

In these circumstances, my view is that this workman must be held to have refused to submit himself for examination, and accordingly, that his right to compensation and to prosecute proceedings must be suspended until such examinations have taken place.

Although it is no doubt not directly in point, it is in any event of interest to note that, having, by agreement of parties, heard the evidence on the merits here, I should, had I been against the employers on their preliminary plea, have had to refer the question of this man's capacity to a medical referee. The question in the case is a purely medical one, and there can be no doubt that Mr. Small was acting in this man's best interests when he signed the minute of parties It should further be added that the employers' law agent had no notice of the workman's refusal to be examined by the medical referee until they met Mr. Small on 4th August in connection with the discussion of a number of other cases. D. S. M.

For pursuer—Mr. J. Chas. E. Hay (Messrs. Hay, Cassels, & Frame), Hamilton.
For defenders—Mr. W. T. Craig, Glasgow.

No. 50.
Lanarkshire
Lord Advocate v Barlow

The Lord Advocate (The Right Hon. Thomas Brash Morison, K.C., His Majesty's Advocate in Scotland for and on behalf of the War Department), *Pursuer;* S. Barlow, *Defender.*

Statute—The Crown—Roy n'est lie per ascum statute si il ne soit expressement nosme—*Increase of Rent, &c. (Restrictions) Act,* 1920.—*Held* that this statute does not apply to the Crown. *Lord Advocate* v. *Baker,* 1921, 37 Sh.Ct.Rep. 177, *approved.*

LANARKSHIRE

Lord Advocate v Barlow

Process—Different Sheriffs-Substitute in same sheriffdom—Uniformity of practice.—In this case the same question of law which was decided in *Lord Advocate* v. *Baker*, 1921, 37 Sh.Ct.Rep. 177, arose, but the case came before a different Sheriff-Substitute who, being satisfied that the only question was the same question of law which had already been answered, declined to consider it of new, and repeated the same finding in law as had been pronounced by his colleague.

The following interlocutors were issued by the Sheriff-Substitute (FYFE) and the Sheriff (A. O. M. MACKENZIE), in the latter of which a statement of the facts will be found:—

June 1, 1921

Sheriff FYFE

GLASGOW, 1*st June*, 1921.—Having heard parties' procurators, finds that the defence stated is founded entirely upon the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: Finds in law that that statute does not apply to the Crown; therefore repels the defence and decerns and ordains as craved; finds defender liable in expenses; allows an account to be given in and remits to the Auditor for taxation. T. A. FYFE.

Note.—Admittedly there is one single question in this case, for defender's agent quite candidly admits that, unless the Rent Act, 1920, is applicable, he has no defence. It would accordingly be senseless to incur the delay, and put parties to the expense of ordering a proof, for the only question in this case has already been decided by the "Sheriff-Substitute of Lanarkshire," and so I do not need to apply my mind to the question, and I have not done so.

The question of law—Does the Rent Act apply to the Crown?—presented itself first to the Court in the case of the *Lord Advocate* v. *Baker*, and on 17th December, 1920, the Court answered that question in the negative, 37 Sh.Ct.Rep. 177. That was a ruling by Sheriff Thomson, one of the Sheriffs-Substitute of Lanarkshire, which was not represented against, and which has not been recalled. It is not for me to review it, which is what I am practically asked to do. All that I have got to do is to repeat, on the interlocutor sheets in this case, the answer which the Sheriff-Substitute of Lanarkshire has already given to the same question of law—admittedly the only question in this case.

This case brings up in the Ordinary Court a matter of principle, and of practice, which had already arisen and been dealt with in the Summary Court in this sheriffdom. Under the innumerable orders made during the war, the same questions were continually arising. But the personality of the presiding Sheriff-Substitute in the Summary

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Court was different in each week. The practice accordingly was adopted that, when a point had been once decided by formal written judgment, that became the judgment of "the Sheriff-Substitute of Lanarkshire" upon that particular point, and when the same point came up again, the Sheriff-Substitute who happened to be presiding had simply to record again the judgment already given. The theory upon which that practice proceeded was that it was only an accident that in Lanarkshire "the Sheriff-Substitute" happens to be represented by a number of different personalities, and that the Court would not countenance litigants trying to play off any one of these against the others.

The same principle seems to me equally appropriate in the Ordinary Court. Parties come into Court seeking the judgment of the Sheriff-Substitute of Lanarkshire—not the personal opinion of Sheriff Thomson or Sheriff Fyfe—and to their question of law they get an answer from a sixth part of the voice of the Sheriff-Substitute of Lanarkshire. They are not entitled to ask some one else, who happens to represent another sixth part of that voice, to reconsider the same question.

Admittedly in this case the only question is the question of law, which has been already answered. T. A. F.

July 26, 1921
Sheriff Mackenzie

Glasgow, 26*th July*, 1921.—The Sheriff, having considered the cause, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute dated 1st June, 1921, complained of, and decerns; finds the defender liable to the pursuer in the expenses of the appeal and remits the cause to the Sheriff-Substitute, with power to decern for the expenses now found due. A. O. M. Mackenzie.

Note.—In this case the Lord Advocate, as representing the War Department of the Government, craves that the defender should be ordained to remove from a dwelling-house in Garrioch Crescent, Glasgow. The house was taken on lease some years ago by the Secretary of State for War—according to the pursuer for the purpose of housing married men in Army service, according to the defender for the purpose of housing workmen, but, for whichever of these purposes the lease was taken, it does not appear to be disputed that the house was leased by the department for public purposes and for the use and service of the Crown. The defender served for some time in the military police, and appears originally to have been allowed the use of the house while in that service, but he was demobilised on 28th January, 1920, and parties differ as to the nature of his title to possess after that date. The averment of the pursuer is, that the defender was allowed to remain

in precarious possession of the house as an act of grace, on the representation that he was unable to find any other accommodation. The defender avers that he possessed as an ordinary tenant, and it is not matter of dispute that he was charged the monthly rent for which the War Department was liable under its lease. In February, 1921, the War Department gave the defender notice to remove, and subsequently raised the present action, to which the defender states the defence that he is entitled to remain in occupation in virtue of the provisions of the Increase of Rent and Mortgage Interest (Restrictions), Act, 1920. The Sheriff-Substitute, following a decision by Sheriff Thomson in a similar action at the instance of the Prison Commissioners, has held this action to be irrelevant on the ground that the Rent Restrictions Act does not bind the Crown, there being no provision in it to that effect. The sole question raised in the appeal is whether this decision is well founded.

There is no doubt that the privilege of the Crown expressed in the maxim "*Roy n'est lie per ascum statute si il ne soit expressement nosme*" extends to the servants of the Crown in the performance of their public duties. It is on this ground that property occupied by servants of the Crown, or by persons not being servants of the Crown who occupy solely as trustees for public purposes required and created by the Government of the country, has been held exempt by them from local rates and Imperial taxes. *Coomber* v. *Justices of Berks*, L.R., 9 A.C. 61. The question is whether the maxim applies in the case of such a statute as the Rent Restrictions Act.

Now, the doctrine embodied in the maxim appears to be of English origin (*The Crown* v. *Magistrate of Inverness*, 18 D. 366, per Lord Curriehill at p. 371), and in the case of the *Lord Advocate and Barbour* v. *Lang*, 5 M. 84, Lord Deas (p. 92) expressed some doubt as to whether privilege extended in Scotland beyond the right of exemption from taxes and rates which had been recognised by the Scottish Courts. But the suggestion that the prerogative is subject to this limitation in Scotland appears to be inconsistent with more recent expressions of judicial opinion (*Somerville* v. *Lord Advocate*, 20 R., per Lord Kyllachy at p. 1064; *Magistrates of Edinburgh* v. *Lord Advocate*, 1912 S.C., per Lord President Dunedin at p. 1091), and I take it that in Scotland, as in England, the privilege expressed in the maxim is recognised as part of the Royal prerogative. The maxim, however, is not without qualification, for the Crown may be bound by necessary implication although not expressly named (Broom's Legal Maxims, pp. 60 and 61) and is bound, according to Bacon, by Acts of Parliament made for

the public good, the advancement of religion and justice, and to prevent injury and wrong (Bacon's Abridgment, Prerogative, E. 5). On the other hand, Acts which would divest or abridge the King of his prerogative, his interests or his remedies in the slightest degree do not in general extend to or bind the King unless there be express words to that effect (Chitty on Prerogative, 382), and in harmony with the view expressed by Chitty it was held in *Cooper* v. *Hawkins*, L.R. 1904, 2 K.B. 164, that a servant of the Crown on Crown service was not bound by the provisions of a bye-law made by a local authority under a power conferred by the Locomotives Act of 1865 limiting the speed of locomotives on highways.

Now, the purpose and effect of the Rent Restrictions Act is to restrict lessors in the exercise of their ordinary contractual rights, and if the Act be held to bind the Crown, public departments may be seriously hampered in their administration of Crown property and in the performance of their public duties. It is not, I think, easily to be assumed that the Legislature intended an Act of this kind to bind the Crown. No doubt the Act may be said to have been passed for the public benefit, as all Acts of Parliament are, but I cannot regard it as an Act made for the public good in the sense of the passage which I have quoted from Bacon's Abridgment, or hold that by necessary implication it extends to and binds the Crown. It would rather appear to me to be an Act which would "abridge the Crown of its interests," to use the language of Mr. Chitty. I agree, accordingly, with the opinion expressed by Sheriff Thomson that the Rent Restrictions Act is not binding on the Crown.

In what I have said I have assumed that there was no mention of the Crown in the Act, but before concluding I should refer to section 12 (10) of the Act, which refers to the case where a Government Department has taken possession of dwelling-houses during the war. The provision is as follows:—"Where possession has been taken of any dwelling-house by a Government Department during the war, under the Defence of the Realm Regulations, for the purpose of housing workmen, this Act shall apply to such houses as if the workmen in occupation thereof at the passing of this Act were in occupation as tenants of the landlords of such houses." The meaning of the sub-section is not very clear, but it was not argued, and I do not think could be successfully argued, that it rendered Government Departments subject to the restrictions imposed by the Act. The Act was passed a year and a half after the conclusion of the Armistice, when many houses taken possession of by the Government for munition workers must already have been restored to the

owners, and the intention of the sub-section appears to me to be that workmen in occupation of such houses at the date of the Act should be entitled to the benefits of the Act as against the landlords of such houses, although they may have originally derived their right of occupation from a Government Department.

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On the whole matter, therefore, I am of opinion that the appeal fails. A. O. M. M.

For pursuer—Mr. W. G. DAVIDSON (Messrs. Biggart, Lumsden, & Co.), Glasgow.
For defender—Mr. ROBERT GRIERSON, Glasgow.

No. 51.

THE LOWER WARD DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF LANARKSHIRE, *Pursuers;* Mrs. ANNIE BARRETT and HUGH BARRETT, *Defenders.*

LANARKSHIRE
Lanarkshire District Committee v Barrett, &c.

Insurance—Life policy—Ownership—Lien on policy for premiums paid—Vitious intromission—Public Health Act, 1897, *sec.* 69 (2)—*Funeral expenses—Privileged debt.—Held* that a sanitary authority, which buried the body of a deceased person at the public expense, was entitled to recover the cost of the interment from persons who as vitious intromitters had cashed a policy of insurance on the life of the deceased, and who claimed to retain the proceeds by way of lien for payment of premiums advanced by them.

This was a Small Debt action raised in the Sheriff Court of Lanarkshire at Hamilton by the Lower Ward District Committee of the County Council of Lanarkshire for recovery of the cost of burial of a deceased person against persons in possession of a policy upon the life of the deceased, who claimed a lien thereon for payment of premiums, but who had no assignation thereof or nomination thereto. The facts sufficiently appear from the considered judgment of the Sheriff (HAY SHENNAN), which is as follows:—

May 12, 1922
Sheriff SHENNAN

HAMILTON, 12*th May*, 1922.—The late Francis M'Kenna died at Rutherglen on 5th December, 1921, and the pursuers, as sanitary authority, were compelled to pay the expense of his interment. They now sue the defenders for repayment on the ground that they have vitiously intromitted with M'Kenna's estate in respect that they uplifted a policy of insurance belonging to the deceased.

The policy in question was taken out by M'Kenna in his own name on 6th November, 1913, and was payable to his heirs. No nomination was ever made in favour of the defenders. He paid the premium of 6d. per week for six

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months. Thereafter the premiums were paid by the defender Mrs. Barrett who was M'Kenna's step-daughter (and therefore not a relative) and the policy was in her possession. The premiums were in arrears at the time of M'Kenna's death. On the proof it is not clear whether Mrs. Barrett paid all the premiums with her own money or whether M'Kenna provided her with the necessary money. In the view which I take of the case this is not material.

The first question to decide is whether this policy was *in bonis* of M'Kenna at the time of his death. *Prima facie* it was. It was his own policy at the beginning and he paid premiums on it. He made no nomination of a payee. But he might competently donate it by handing over the policy (see *Hadden* v. *Bryden*, 1899, 1 F. 710, and compare *Carmichael* v. *Carmichael's Executrix*, 1920, S.C. (H.L.) 195). The onus, however, is on the donee to prove donation. Here the only evidence is that of the donee herself, which is clearly insufficient. She is not very clear, but I think her attitude really is that she acquired right to the policy in virtue of paying the premiums. On the evidence before me, it is impossible to hold that the deceased made a gift of the policy to Mrs. Barrett. Therefore it was *in bonis* of the deceased at the time of his death.

That being so, the defenders in obtaining payment of the proceeds of the policy were vitious intromitters with the deceased's estate. The male defender maintains that he took nothing to do with the matter, but the evidence shows that he participated actively in obtaining payment from the insurance company. He represented to them that he was the deceased's son-in-law and asked for payment. He was told that the payment would be made to his wife through the local agent and payment was made on the footing that Mrs. Barrett was the deceased's daughter. She was in fact a stranger in law. The defenders were no more entitled to receive payment than any man in the street. As vitious intromitters they have rendered themselves liable to the present claim. The sum actually paid was £10 14s.

But the defenders contend that they have a lien on the policy for repayment of the premiums advanced by them. I refer to the recent case of *Morgan* v. *Morgan's Judicial Factor*, 1922, S.L.T. 247, and the cases cited by Lord Hunter. What the defenders have is a claim for recompense against the deceased's estate. As I read the decisions they were not entitled to retain the policy until their claim was met. In fact, the only legal method in which they could make their claim good was by getting M'Kenna's executor to realise the policy and then claiming against the executry. They cannot benefit by their illegal action in

obtaining payment from the insurance company as they did. Accordingly, they are ordinary creditors of M'Kenna's estate in respect of their claim for recompense, and that claim cannot be met until privileged debts are paid.

The result is that, funeral expenses being a first charge on the executry, the pursuers are entitled to decree.

Decree for £6 10s. with £3 11s. 6d. of expenses.

HAY SHENNAN.

For pursuers—Mr. ROBERT LAMOND, Glasgow.
For defenders—Mr. DONALD C. ORR, Hamilton.

SHERIFF COURT OF AYRSHIRE.

No. 52.

MRS. HELEN MOSSMAN or MACKAY, *Pursuer;* A. C. PENMAN, LIMITED, *Defenders.*

Jurisdiction—Business in Shire—Transfer of business by limited company to director—No notice of transfer made to public or to customers—No change in personnel *of staff—Banking account—Sheriff Courts Act,* 1907 (7 *Edw. VII., cap.* 51), *sec.* 6 (*b*).—By minute dated 8th March, 1921, a limited liability company trading under the name of the principal partner with the addition of the word "Limited," and having their head office in Dumfries, sold their branch business at Ayr as from 1st January, 1921, to the said partner. Thereafter the word "Limited" was removed from the sign-board above the premises at Ayr and deleted from the printed forms used there, but no notification of the change of proprietorship was made to the public by advertisement or to the customers of the company by circular. The *personnel* of the staff at Ayr remained unaltered. Down to 12th March, 1921, payments of accounts due to the company's branch at Ayr prior to 8th March were paid into the company's banking account at Ayr, and down to 2nd April, 1921, payments of accounts owing by the company's branch at Ayr prior to 8th March were paid by cheques on the said bank signed by the manager at Ayr on behalf of the company and issued from the said premises. The company's bank account at Ayr was closed on 27th August, 1921. *Held* that on 11th March, 1921, the company were still carrying on business, and had a place of business within the jurisdiction of the Sheriff at Ayr in the sense of sec. 6 of subsec. (*b*) of the Sheriff Courts Act, 1907.

In this case the pursuer craved the Court to summarily eject the defenders from a garage at Ayr of which she was the owner. The defenders pled, *inter alia*, that, as they had no place of business at Ayr, and were not subject to the jurisdiction of the

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Court, the Court had no jurisdiction to try the same. The following interlocutor of the Sheriff-Substitute (Broun) sufficiently details the facts:—

Ayr, 29*th December*, 1921.—The Sheriff-Substitute having considered the cause, finds in fact (1) that prior to June, 1920, Andrew Clark Penman carried on business as a motor engineer and motor carriage manufacturer in the premises at 15 Beresford Terrace, Ayr, referred to in the initial writ, which premises he occupied under a lease for ten years granted to him in 1913 by the pursuer; (2) that in June, 1920, the said Andrew Clark Penman along with his brother, Maxwell Penman, formed a limited liability company which took over the motor car businesses of the said Andrew Clark Penman at Dumfries, Moffat and Ayr, and of the said Maxwell Penman at Castle-Douglas and Dalbeattie, the head office of the said company being at Dumfries and the said business at Ayr being purchased by the company from the said Andrew Clark Penman as from 1st January, 1920; (3) that the directors of the said company were the said Andrew Clark Penman and Maxwell Penman and James B. Penman and John Semple Penman, both sons of the said Andrew Clark Penman; (4) that the said John Semple Penman was appointed secretary of the said company and also manager of the business at Ayr which he had managed for the said Andrew Clark Penman from January, 1920; (5) that questions having arisen between the pursuer and the said Andrew Clark Penman as to the rights of the company to occupy the said premises at 15 Beresford Terrace, Ayr, leased to the said Andrew Clark Penman, the pursuer, through her law agents, gave written notice, dated 1st March, 1921, to the defenders that failing their removal from the said premises within two weeks an action of ejection would be raised against them; (6) that on 8th March, 1921, at a meeting of the directors of the defenders at Dumfries it was proposed and carried that the business at the County Garage, Ayr (the said premises at Ayr), be sold to A. C. Penman, including stock in trade, plant, and book debts, goodwill, &c., as from 1st January, 1921, at a price equivalent to its value as shown in the audited accounts and balance sheet at that date; (7) that on 8th March, 1921, in respect of the said minute, the said John Semple Penman removed the word "Ltd." and the letter "S" from the sign-board "A. C. Penman, Ltd., automobile engineers, Ayr and Dumfries" above the window of the said premises at Ayr and gave instructions to the staff on the said premises that the business now belonged to the said Andrew Clark Penman and that the word "Ltd." was to be deleted from the forms of accounts and other

forms used in connection with the business; (8) that the change in the proprietorship of the said business at Ayr was not notified either publicly, by advertisement in the newspapers or otherwise, or by circulars or notice to the customers of the defenders; (9) that after 8th March, 1921, the said John Semple Penman continued to act as secretary of the defenders and as manager at Ayr for the said Andrew Clark Penman and no change of any kind was made in the *personnel* of the staff at Ayr; (10) that down to 12th March, 1921, monies received by the defenders at the said premises in payment of accounts due to the defenders by customers prior to 8th March were paid into the banking account of the defenders with the Royal Bank of Scotland, Ayr; (11) that down to 2nd April, 1921, payment of monies due by the defenders for accounts owing by them to customers prior to 8th March, 1921, were paid by cheque on the said bank signed by the said John Semple Penman for the defenders and issued from the said premises at Ayr; (12) that the banking account of the defenders with the said bank was not closed till 27th August, 1921; (13) that a new banking account in the name of the said Andrew Clark Penman in connection with the said business at Ayr was opened with the said bank on 16th March, 1921; (14) that on 11th March, 1921, the defenders were cited at the said premises at Ayr, by a Sheriff Officer leaving a copy of the initial writ and warrant with citation annexed for the said defenders in the hands of the said John Semple Penman as a servant of the defenders in presence of a witness; Finds in law that on 11th March, 1921, the defenders carried on business and had a place of business within the jurisdiction of this Court and were cited at such place of business; therefore repels the second plea in law for the defenders and orders the case to be put to the Roll for further procedure; grants leave to appeal.

JAMES C. C. BROUN.

Note.—I have set forth the facts of this case so fully in my interlocutor that it is unnecessary to go further into details. Legal authority on the interpretation of sec. 6 (*b*) of the Sheriff Courts Acts, 1907 and 1913, is somewhat scant and the circumstances of the present case are so exceptional that it is impossible to fit it into any general groove. The question which has to be answered is two-fold—Whether on the facts set forth the defenders, on 11th March, 1921, (1) were carrying on business in Ayr; and (2) had a place of business at the premises mentioned. I am of opinion that, on that date, they were carrying on business and had a place of business at these premises. It might have been otherwise if they had given due notice of

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the change of ownership to the public by advertisement or to their customers by notice. Or it might have been otherwise if sufficient time had elapsed to bring the fact of the change to the knowledge of any reasonably intelligent customer or member of the public. In my opinion there is no ground for any imputation of fraud against the defenders or Mr. A. C. Penman. But if by means of a resolution carried at a private meeting of the directors of a company such a company within three days after the meeting and without practically any notification to its customers or the public and without any alteration in the staff or premises could, like the Snark, "softly and suddenly vanish away" from the jurisdiction, it appears to me a happy hunting ground would be opened up for the manœuvres of bogus and fraudulent companies. The meaning of the words of sec. 6 (*b*) must be construed reasonably and looking to the special facts of this case I do not think it would be reasonable to hold that on 11th March, 1921, the defenders were not carrying on business at the premises in Ayr.

As I have said, I do not think there is the slightest ground here for any imputation of fraud, and I think it was a pity that the pursuer's agent thought it necessary to question the accuracy of the minute of 8th March. In my opinion what happened was that Mr. A. C. Penman discovered that his having transferred the business at Ayr to the company might cause difficulties between himself and the pursuer in connection with the lease and he took such steps as he could to cancel the transfer.

Although the pursuer has succeeded in the question of jurisdiction it might be advisable for both parties to consider whether they should not settle this case out of Court and obviate further expense. Nine months have elapsed since 8th March, 1921. The proof, so far as led, appears to disclose that the defenders have now severed their connection with the Ayr business and by this means the fact of their having done so may be held to have been brought home to the pursuer. If that turned out to be the case there might be difficulty in a Court pronouncing a useless decree of ejection which is all the remedy sought in this action.

J. C. C. B.

On appeal, the Sheriff (W. Lyon Mackenzie) adhered in the following interlocutor:—

March 25, 1922
Sheriff Lyon Mackenzie

Ayr, 25*th March*, 1922.—The Sheriff, having resumed consideration of the cause, refuses the appeal; adheres to the interlocutor of the Sheriff-Substitute, of 29th December, 1921, complained of; finds the defenders liable to the pursuer in her expenses of the appeal; allows an account thereof to be given in; remits the same, when lodged, to the

Auditor, to tax and report; and remits the case to the Sheriff-Substitute to proceed as accords.

W. Lyon Mackenzie.

Note.—A very able and exhaustive argument was submitted on behalf of the defenders and appellants in this case, to which, however, after the fullest consideration, I am unable to give effect.

The learned Sheriff-Substitute has set forth the material facts of the case very fully in his interlocutor and note, and these need no amplification by me.

The salient question is what was the effect of the alleged transaction at Dumfries on 8th March, 1921, between the defenders and Mr. A. C. Penman?

The only document dealing with the matter is the minute of meeting of the directors on that date, which records that, "It was proposed and carried that the business at the County Garage, Ayr, be sold to A. C. Penman, including stock-in-trade, plant, book debts, goodwill, &c., as from 1st January, 1921, at a price equivalent to its value as shown in the audited accounts and balance sheet at that date."

While the minute is conclusive evidence against the defenders of what their directors resolved to do, there is no evidence to show that Mr. A. C. Penman accepted that offer on that date. It is true that Mr. J. S. Penman, one of the directors and the secretary of the defenders' company, and who had charge of their branch at Ayr went the same day to Ayr and ordered a change in the sign name by the painting out of the word "Limited," but no one says that he did so acting on the instruction of Mr. A. C. Penman or that he had been engaged by Mr. A. C. Penman as an individual to take charge of the Ayr business on his behalf.

In my opinion it would require very clear evidence to rebut the presumption that Mr. John S. Penman held himself out as continuing to act at Ayr as representing A. C. Penman, Limited, and carrying on business on their behalf, as he had formerly done, in the absence of any overt act having been proved of his ever representing the contrary to any one outside the employees

The cheques issued on 11th March, 1921, signed A. C. Penman, Ltd., appear to me to be a piece of real evidence in support of the pursuer's contention which is more than corroborated by the various advertisements and other documents referred to in the proof. All these incidents are possibly capable of explanation but they are too numerous to be explained away merely by saying that they were an oversight or coincidence.

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There was a clear duty upon the defenders to see that their severance of connection with the Ayr business was clearly notified at the earliest possible moment, and in my view they have failed to prove that this was done, which is amply confirmed by Miss Dempster who says that, apart from the dropping of the word "Limited" in the correspondence and receipts, there was no intimation whatever of the change sent to customers or to the public. It is further corroborated by the significant fact that no intimation was made to the employees at Ayr that they were no longer in the service of the defenders, and it was left to Mr. A. C. Auld, the foreman, to discover this for himself.

After an exhaustive consideration of the numerous productions in the case, and a further perusal of the evidence, I am satisfied that what took place on 8th March, 1921, was no more than what is so aptly described by Mr. John S. Penman as a constructive change in the business at Ayr, in order to fortify Mr. A. C. Penman in his dispute with the pursuer over another matter and that the business was *de facto* carried on as before, in the expectation as Mr. John S. Penman expressed it to Mr. M'Culloch, the painter who altered the sign-board, that it would be of a temporary character.

I according agree with the Sheriff-Substitute and have refused the appeal with expenses.

I would only add that I differ from the view expressed by the Sheriff-Substitute as to a possible difficulty in granting a decree of ejection.

If in fact Mr. A. C. Penman is now in actual possession of the subjects he derives his right entirely from the defenders, and the pursuer is not bound to recognise his existence or presence in any shape or form. W. L. M.

For pursuer—Mr. George M. Lockhart (Messrs. John, W. & G. Lockhart), Ayr.

For defenders—Mr. A. Whitson (Messrs. M'Clure, Naismith, Brodie & Co.), Glasgow.

No. 53. Henry Percy Sterndale M'Mikin's Curator, *Pursuer;* Local Authority of Carrick District of County of Ayr, *Defenders.*

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M'Mikin's Curator v Local Authority of Carrick District of County of Ayr

Process — Appeal — Competency — Repair of houses suitable for occupation by working classes— Housing, Town Planning, &c. (Scotland), Act, 1919 (9 *and* 10 *Geo. V., cap.* 60), *sec.* 25 (1).—In terms of sec. 25, sub-sec. (1) of the Housing, Town Planning, &c. (Scotland), Act, 1919, notices were served by a local authority on the owner of a farm to execute certain work alleged to be necessary to make the cot houses on the farm in all respects

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reasonably fit for human habitation. The owner raised an action in the Sheriff Court to have these notices recalled. After proof, the Sheriff-Substitute pronounced an interlocutor refusing to recall the notices. The owner having appealed to the Sheriff, *held* that the appeal was incompetent. *Remarks* as to the appropriate form of appeal.

Public health—Housing of working classes—Housing, Town Planning, &c. (Scotland), Act, 1919 (9 *and* 10 *Geo. V., cap.* 60), *sec.* 25—*Repair of houses not reasonably fit for human habitation—Cot houses on farm—Owner—Dry closets and wash-houses.*—By sub-sec. (1) of sec. 25 of the Housing, Town Planning, &c. (Scotland), Act, 1919, it is enacted that if the owner of any house suitable for occupation by persons of the working classes fails to keep such house in all respects reasonably fit for human habitation, the local authority may serve a notice on such owner requiring him within a reasonable time to execute such works as may be necessary to make the house in all respects reasonably fit for human habitation. By sub-sec. (3) it is provided that in the section the word "owner" shall have the same meaning as in the Public Health (Scotland) Act, 1897. *Held* (1) that cot houses on a farm fell under the section; (2) that the owner of the farm was the owner of the cot houses within the meaning of the section; and (3) that dry closets and wash-houses, although separated from the houses were necessary pertinents of the houses, and must be kept in similar condition. *Remarks* as to the appropriate form of the notice to be served by the local authority.

The local authority of the Carrick District Committee of the county of Ayr served notices on the owner of a farm requiring him to execute certain works which they alleged were necessary to make certain cothouses on the farm in all respects reasonably fit for human habitation. The owner raised an action in the Sheriff Court of Ayrshire at Ayr craving the Court to recall these notices. The circumstances of the case and the questions decided sufficiently appear from the following interlocutors and notes of the Sheriff-Substitute (BROUN) and the Sheriff (LYON MACKENZIE):—

Jan. 19, 1922

Sheriff BROUN

AYR, 19*th January*, 1922.—The Sheriff-Substitute, having considered the cause, with consent of the defenders recalls the notice (No. 6 of process) *quoad ultra*; finds in fact (1) that the pursuer, as curator of Henry Percy Sterndale M'Mikin, of Grange, Maybole, is the owner of the houses, Nos. 1 to 5 inclusive, mentioned in the crave of the initial writ; (2) that the said houses are all joined together

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in a row which runs along the west side of the public road from Ayr to Maybole at Slateford, about 1½ miles from Maybole; (3) that the said houses are situated on the farm of High Grange, and were let as part of the said farm to John Hannah, farmer, by Thomas M'Mikin Craufuird, the former proprietor of the farm, by written lease for nineteen years from the term of Martinmas, 1888, the said lease being dated 26th February, 1890, and 16th May, 1891, and having been renewed from year to year by tacit relocation down to the present time; (4) that the pursuer is the person for the time entitled to receive the rents of the said farm, including the said houses, from the said John Hannah; (5) that the said houses are suitable for occupation by persons of the working classes, and are, in fact, at the present date all occupied by such persons, to whom they have been sub-let by the said John Hannah, some of these sub-tenants not being workers on the said farm; (6) that the dry closets and wash-houses appertaining to the said houses are necessary pertinents of the said houses, without which the said houses would not be suitable for human occupation; (7) that the said houses (including therein the said necessary pertinents) are not in all respects reasonably fit for human habitation: Finds in law that the pursuer is owner of the said houses in the sense of sec. 25 of the Housing, Town Planning, &c. (Scotland), Act, 1919, and is bound to execute such works as may be necessary to make the houses in all respects reasonably fit for human habitation; therefore refuses to recall the five notices relating to the said houses mentioned in the initial writ, but, as the appeal has made necessary an alteration in the dates and season of the year mentioned in the notices, alters the period therein mentioned for executing the repairs to one of three months from this date, ending on 19th April, 1922; finds no expenses due to or by either party. James C. C. Broun.

Note.—The defenders, by their minute (No. 17 of process), have consented to the recall of the notice applying to the smithy. I have, therefore, to deal only with the five dwelling-houses mentioned in the initial writ. It may be explained that there is a sixth dwelling-house in the row, which the defenders' witnesses stated was overlooked when the notices were sent out; but only five dwelling-houses are dealt with in this case.

I am of opinion that the pursuer is the owner of these houses as defined in the Public Health (Scotland) Act, 1897, which is the definition adopted in sec. 25 of the Act of 1919. The houses have been let to Mr. Hannah along with the farm, and the pursuer is entitled to draw the rents of the farm, including the houses, and does draw the rents from

Mr. Hannah. It does not appear to me to matter that the houses are let along with the farm. It might as well be said that if the proprietor of a tenement of houses let the whole tenement to one person for a yearly rent, and the tenant sub-let each of the houses in the tenement, the proprietor of the tenement was not the owner of the houses in the sense of the Act.

I am further of opinion that the houses fall within the meaning of sec. 25. They are houses suitable for occupation by persons of the working classes, and are, in fact, occupied by such persons. The pursuer contends that they are cot houses on the farm; but I see no provision in the Act, taking cot houses, even when occupied by workers on a farm, out of the scope of this section. The Act appears to lay it down that all houses occupied by persons of the working classes must either be rendered fit for human habitation or closed for such habitation.

Then it is contended that as the dry closets and wash-houses provided for the use of the occupants of the houses are not joined on to the houses, these privies and wash-houses may be allowed to fall to pieces, and yet the houses may still be considered in all respects reasonably fit for human habitation. I am unable to follow this argument. This row of houses each consisting of two living rooms occupied by different families and different sexes, could not possibly be in all respects reasonably fit for human habitation if the necessary privy and washing accommodation was not provided for the houses. These dry closets and wash-houses are necessary pertinents of the houses, and the want of these pertinents would render the houses, if occupied, dangerous to health as well as inimical to decency.

I now turn to the question—Are these houses in their present condition, or any of them, in all respects reasonably fit for human habitation, I think it is clearly proved that none of them fulfils this condition. Even if I had any doubts on the subject I should have held that it would require very strong evidence indeed to entitle me to overturn the conclusion at which the defenders have arrived. As was pointed out by the Court in the case of *Macdougall* v. *Perth Corporation*, 1920, 2 S.L.T. 320, the Legislature has committed primarily at least the decision on points of this kind to the local authority to whom the sanitary interests of the community have been entrusted, and it would need, as I have said, very strong evidence to justify the Court interfering with their discretion on a matter of fact of this kind. But I have no doubt that the whole of these houses are not in all respects reasonably fit for human habitation.

Now as to the remedies. In all the notices the pursuer

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is required to repair the dry closets and the wash-houses. Little comment on this direction is required. These closets and wash-houses have to be put in such a state that they can be used by the occupants of the houses with decency and without danger to health. At present the slates are off the roofs, water is dripping on to the seats of the closets in wet weather, doors are awanting, &c. All this must be remedied. Further, there appears to be no drain to carry off the dirty water from the wash-houses. I think such a drain should be provided.

In one of the houses part of the cement floor is broken, and in another part the wooden floor is rotten. These defects will require to be put right. It is a question of degree when such defects cause danger to the health of the occupants of the houses. These houses are small, and constantly occupied by children and others, and defects in the floor are apt to harbour disease and promote infection. The local authority are of opinion that the existence of these defects cause the houses referred to not to be in all respects reasonably fit for human habitation. I see no reason to interfere with their discretion in so judging.

The same reasoning applies to the windows in one house which have become broken on account of the framework being rotten. They will have to be repaired.

I understand that the rhones have been put right since the notice was served.

I now turn to the remaining but important defect applying to all the houses. The notices require the pursuer to "repair the walls so as to prevent dampness." This requirement might certainly have been better expressed. But to "repair" means to "restore to a sound or good state," and in that sense of the word a wall may be said to be repaired not only by what I may call active repairs on the structure of the wall but by removing the outside causes which have brought about the defective state of the wall. It is proved that the lower parts of most of the inside walls, the back walls especially, are more or less affected by dampness during the whole of the year. The dampness becomes, of course, much worse in winter. There was a theory put forward by the witnesses for the pursuer that this dampness was caused by condensation. Such a theory, in my opinion, is untenable. Condensation takes place on sudden changes of temperature and is caused by the moisture in the air condensing on walls, windows, or other objects which are colder than the surrounding atmosphere. The idea that parts of the heated wall of a stuffy little kitchen can remain damp throughout the whole year from such a cause appears to me extravagant. The dampness can be accounted for much

more simply. Behind this row of houses the ground slopes upwards to the fields, and the surface water naturally runs down the slope till it comes against the back wall of the houses. There is nothing but field drains to carry off the water round the row of houses. These field drains have not been examined for more than twenty-five years. There is not even a ditch at the back of the houses. On the contrary the earth is piled up against the back of the houses for over a foot on an average, in one instance the soil coming within 4 inches of the window of the house and being 2 feet above the level of the floor inside the house. The houses are slated and have rhones, but there are not enough conductors to carry off the water from the roof. So the rhones overflow in wet weather. The proper number of conductors to carry off the water is shown in the plan (No. 13 of process) made when the houses were reconstructed in 1895, but the whole of these conductors have not been put up. The conductors which have been put up discharge into the field drain beforementioned. The result of all these things is that the stagnant water lies beside the houses, moistens the earth piled up against the wall at the back, and percolates into the foundations of the houses. There is no damp-proof course round the houses. All ordinary stones have a tendency to suck up moisture, and it is for that reason that a damp-proof course is now put round all houses. Here, there being no damp-proof course and the ground being continually damp and sodden for the reasons before mentioned, the walls of the houses tend to suck up the moisture, the dampness of the wall being more or less in proportion to the quantity of water in the soil beneath it, and to the softness of the stone of which the wall is built. The partition walls between the houses may be built more loosely or of softer stone than the outer walls, which would account for the dampness on the partition walls in one of the houses being so marked. It is also proved that, in one or two cases the chimney heads are broken, which, of course, will allow water to get into the partition wall from above. But there is no doubt that the worst of the dampness is in the lower part of the back wall behind which is piled up the sodden soil.

To remedy this state of matters it appears to me, after having heard the evidence, that the following work is essential. The earth behind the houses should be excavated to a depth below the level of the floor inside and removed to a distance of 4 feet from the wall. The field drain should be examined to see if it is in a proper state for carrying off the surface water. The proper number of conductors, as shown on the plan (No. 13 of process) should be put up to

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carry off the water from the roof. A closed drain should be laid along the front and back of the houses, and into this drain the conductors from the rhones should be led. The chimney heads, the bridges between the chimneys, and the walls of the houses should be repaired where necessary. Where the foundation of the houses is exposed, the joints should be pointed to prevent water leaking into the foundations.

As regards the lathing and plastering of the walls inside the houses, while I have no doubt if this were done it would be a great improvement and would make the houses more comfortable, I am not satisfied on the evidence led by the defenders that they definitely reached the conclusion that lathing and plastering were absolutely necessary in order to make the houses reasonably fit for human habitation. Thus, for instance, Mr. Eaglesham, a witness for the defenders, stated that the lathing and strapping might stand over in the meantime till the cost of material fell, and also appeared to concede that the houses might be reasonably habitable without lath and plaster, although afterwards he seemed inclined to withdraw the concession. In such a state of the evidence, I am unable to direct the pursuer to lath and plaster the houses. After the pursuer has made the repairs which I have already detailed, and after a reasonable period has elapsed to test the efficiency of these repairs, the defenders can again inspect the houses, and if they then come definitely to the conclusion that lathing and plastering is necessary to make the houses reasonably fit for human habitation, they can serve new notices on the pursuer requiring him to execute the work.

The period specified, in the present notices, for doing the work, must of necessity be altered as the result of this appeal. As it is now winter, and the operations may take longer time than they would have done if performed in June, I have allowed the pursuer three months from this date to execute the work.

As a result of this case I may be allowed to say that when a local authority decides to serve a notice in terms of sec. 25 of the Act of 1919, they should have before them full details of the works which they consider absolutely necessary to make the house in all respects reasonably fit for human habitation, and I think it would be advisable for them to set forth in the notices these details in simple language which can be understood by the meanest intelligence. If there are alternative modes of doing the work satisfactorily, the alternatives can be stated. The insertion in the notices of vague, misleading, or indefinite phrases which require exposition and interpretation is of

all things to be avoided. Before the notices are sent out the local authority should be fully aware of the remedies necessary to cure the defects, and they can easily state their requirements in the notices. J. C. C. B.

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On appeal, the Sheriff (W. LYON MACKENZIE) held the appeal incompetent in the following interlocutor:—

Feb. 21, 1922

Sheriff LYON MACKENZIE

AYR, 21*st February*, 1922.—The Sheriff, having resumed consideration of the cause, finds that the present appeal is incompetent; dismisses the same; finds the defenders liable to the pursuer in his expenses of the appeal; allows an account thereof to be given in; remits the same when lodged to the Auditor to tax and to report; and remits the case to the Sheriff-Substitute. W. LYON MACKENZIE.

Note.—In this case the defenders and appellants served certain notices upon the pursuer and respondent under sec. 25 (1) of the Housing, Town Planning, &c. (Scotland), Act, 1919, to repair certain houses on the farm of High Grange, in the parish of Maybole and county of Ayr, tenanted by John Hannah, farmer, there.

The pursuer and respondent, having taken exception to these notices, took the present proceedings, upon which, after various procedure and a proof, the Sheriff-Substitute pronounced an interlocutor on 19th January, 1922, disposing thereof. Against this interlocutor the defenders have appealed.

At the hearing of the appeal an objection was taken to the competency thereof, in respect that no appeal could be taken from the Sheriff-Substitute to me.

Sec. 25 (4) of the Housing, Town Planning, &c. (Scotland), Act, 1919, enacts—"This section shall be deemed to be part of Part II. of the principal Act." The principal Act is the Housing of the Working Classes Act, 1890, of which Part II. deals with unhealthy houses. The procedure thereunder regarding appeals against an order of a local authority is regulated by sec. 35, as modified by sec. 95 regarding legal proceedings in Scotland. Sec. 35, as applied to Scotland, enacts—"(1) Any person aggrieved by an order of the local authority under this part of the Act (Part II.) may appeal against the same to the Sheriff, and no work shall be done nor proceedings taken under any order until after the appeal is determined. (2) Provided that (*b*) the Court shall at the request of either party state the facts specially for the determination of the Court of Session, in which case the proceedings may be removed into that Court."

The competency of the appeal depends upon the con-

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struction of the section above quoted. It appears to me to be open to two interpretations, viz. :—

1. That after the Sheriff-Substitute has given his judgment the party dissatisfied therewith can ask for a stated case to the Court of Session, such as is the procedure in workmen's compensation cases, or

2. That during the procedure in an application such as the present, and after the facts have been ascertained but before the Sheriff-Substitute has pronounced a judgment thereon, it is open to either party to request him to state the facts specially for the determination of the Court of Session, and having done so, to remit the case to that Court for its decision, but failing such an application being made to him before he has issued his judgment or taken it to avizandum his decision is final.

The construction of the section is not free from difficulty, and I do not need to express any definite view upon which of the two alternatives I have set forth is the correct and true interpretation thereof; but having regard to the judgment in *Johnstone's Trustees* v. *Glasgow Corporation*, 1912, S.C. 300, I am inclined to consider the latter view the true interpretation of this statute.

But whether I am right or not in that conclusion, I am clearly of opinion that by no interpretation of the statute is an appeal to me competent.

I have accordingly dismissed the appeal with expenses.

W. L. M.

For pursuer—Mr. David A. Guild, advocate, instructed by Messrs. John, W. & G. Lockhart, Ayr.

For defenders—Mr. William Andrews (Messrs. Andrews & Aitchison), Ayr.

SHERIFF COURT OF MIDLOTHIAN.

No. 54.

Midlothian

Barnes *v* Hannay, &c.

William Barnes, *Pursuer;* Mrs. Elizabeth Hannay and Another (Miss Margaret Dingwall Innes' Executors), *Defenders.*

Process—Proof—Additional evidence.—Application (made after Sheriff-Substitute had given judgment) to be allowed to lead further evidence alleged to have been omitted owing to neglect of agent to call certain witnesses, *refused.*

In this case the pursuer sued the executors of the deceased Margaret Dingwall Innes, his sister-in-law, for the sum of £139 8s. 6d., being the balance alleged to be due to him for board, lodging, washing, and clothing afforded by him to the said Margaret Dingwall Innes from 1st January, 1919, to 23rd October, 1920. The Sheriff-Substitute found that Margaret

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Dingwall Innes did not come to stay with pursuer until the beginning of August, 1919, and that the pursuer had failed to prove that she was due pursuer any part of the sum sued for except an admitted sum of 10s., for which he granted decree. The pursuer appealed to the Sheriff, and lodged a minute craving to be allowed to lead additional evidence by witnesses therein named for the purpose of showing that Margaret Dingwall Innes had come to live with the pursuer in the beginning of 1919. The Sheriff (CROLE) in the subjoined interlocutor refused the crave of said minute.

March 9, 1922

Sheriff CROLE

EDINBURGH, *9th March*, 1922.—The Sheriff, having heard parties' procurators on the minute for the pursuer (No. 15 of process), and considered the same, refuses the crave of the said minute and appoints the case to be put out for hearing on the pursuer's appeal, on Monday, 13th inst., at 10.30 a.m. G. L. CROLE.

Note.—This is an action against the executors of a person deceased for payment of an account for board, lodging, &c., alleged to have been incurred by the deceased prior to her death. The main question in the case is, how long did the deceased reside with the pursuer? The pursuer's case is that the deceased came to reside with him on 4th January, 1919, but the Sheriff-Substitute, after proof, decided that the deceased did not go to reside with him till the end of July or beginning of August of that year. The pursuer by minute (No. 15 of process) now craves the Court to allow him to lead further evidence relating to the period of time the deceased resided with him and the agreement as to the rate of payment. A motion of this nature can only be granted for weighty reasons and in exceptional circumstances (*Mabon* v. *Cairns*, 3 R. 47; *Allan* v. *Stott*, 20 R. 804). In my opinion in this case no sufficient reasons for allowing additional proof have been stated. The pursuer in his minute does not set forth any grounds upon which he bases his motion. At the hearing it was stated on his behalf that his former agent had omitted to call certain witnesses whose names are set forth in the minute. It is not said that the pursuer did not know of the existence of these witnesses, and no explanation other than that above stated is given for their not being called. I notice that three of them reside in the same street as the pursuer, and two of these in the same stair. I think that with reasonable diligence all the witnesses set forth in the minute could have been discovered before the proof (*Miller* v. "*Mac*" *Fisheries, Limited*, 22nd December, 1921, S.L.T., current volume, Lord Pre-

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sident Clyde's opinion). It seems to me that the pursuer, by his own negligence, has failed to bring forward evidence which was available to him (*Coul* v. *County Council of Ayrshire*, 1909, S.C. 422—Lord President Strathclyde's opinion, 424). I therefore think that the crave of the minute ought to be refused. G. L. C.

The Sheriff thereafter, in terms of a minute lodged for the pursuer, dismissed the appeal, affirmed the judgment of the Sheriff-Substitute appealed against, and of consent of parties found no expenses due to or by either party in the appeal.

For pursuer—Mr. A. W. Gordon, Edinburgh.
For defenders—Mr. W. A. Ross (Messrs. Archibald Menzies & White, W.S.), Edinburgh.

SHERIFF COURT OF RENFREW & BUTE.

No. 55.
Renfrew and Bute
Postmaster-General v Grimmond

THE POSTMASTER-GENERAL, *Applicant;* JOHN GRIMMOND, *Respondent,*

Property—Telephone pole—Dispute or difference as to its removal—Contract—Proximity to dwelling-house—Nuisance—Public interest—Implied consent Telegraph Act, 1863, *secs.* 22, 30, *and* 34; *Telegraph Act*, 1878, *secs.* 2, 3, 4, and 5; *Telegraph Act*, 1892, *secs.* 4 *and* 9; *Telegraph (Arbitration) Act*, 1909, *sec.* 1; *Telegraph Act*, 1916, *secs.* 1 *and* 2.—When a landowner consents to the erection of a telegraph or telephone pole on his property, and subsequently requests its removal, the special tribunal set up under the above statutes (in Scotland the Sheriff as arbitrator) may consent, so as to bind the landowner, that the pole remains. *Circumstances* in which such substituted consent refused.

This case was initiated by a note presented under sections 3 and 4 of the Telegraph Act, 1878, for the determination of a difference between the Postmaster-General and Mr. John Grimmond, Chatsworth, Giffnock.

The circumstances under which the difference arose were these:—By letter dated 8th December, 1906, Mr. Charles Robb, who at that date was the occupier and owner of Chatsworth, granted permission to the National Telephone Company, Limited, to erect a telephone pole in the grounds at Chatsworth. That permission was granted on these terms:—"This grant extends from 1st November, 1906, till 1st November, 1907, and must be renewed annually. Notice of termination to be six months. The sum of ten shillings

to be paid annually as rent." In virtue of this permission, the pole was duly erected by the National Telephone Company, Limited. As from 31st December, 1911, the plant, property, and assets of the National Telephone Company, Limited, were transferred to the Postmaster-General. In or about 1914 Mr. Robb erected in the grounds of Chatsworth, in close proximity to the pole, a building consisting of a garage and chauffeur's dwelling-house. The pole was situated 1 foot 9 inches from the wall of that building, and 8 inches from the projecting eaves of the roof of the dwelling-house. In March, 1921, the respondent, Mr. Grimmond, acquired the property, including the whole grounds and buildings, known as Chatsworth, from the trustees of the deceased Charles Robb, and at the time of the dispute was the owner and occupier thereof. By letter dated 28th May, 1921, the respondent gave notice to the Postmaster-General that he required the removal of the telephone pole. The Postmaster-General, as stated in the note, "declines, in the public interest, to remove the said pole."

The respondent objected to the competency and relevancy of the application. He contended that, in respect the pole is placed within 10 yards of a dwelling-house, he, being owner of the dwelling-house, entitled to possession, has, under the Telegraph Act, 1863, sec. 22, sub-secs. (3) and (4), a definite statutory right to have the pole removed from its present position, and to have any question arising as to such removal determined in the manner provided in sec. 22, sub-sec. (5) of that Act. The arbitrator under the statute (Sheriff IRVINE) issued judgment as follows:—

April 22, 1922
Sheriff IRVINE

PAISLEY, 22*nd April*, 1922.—The Sheriff, as arbitrator, refuses the consent or power craved in the application; finds the applicant liable in the expenses of, and incidental to, this arbitration and award, including the expenses incurred by the respondent (Mr. John Grimmond), as the same may be taxed in accordance with the provisions of secs. 30 to 33, both inclusive, of the Regulation of Railways Act, 1868, by the Auditor of the Sheriff Court at Paisley; allows an account thereof to be given in; and remits the same, when lodged, to the said Auditor to tax and to report.

J. M. IRVINE.

Note.—This is a Note presented under secs. 3 and 4 of the Telegraph Act, 1878, for the determination of a differ-

ence between the Postmaster-General and Mr. John Grimmond, Chatsworth, Giffnock.

The circumstances under which the difference has arisen are these—By letter dated 8th December, 1906 (No. 3 of process), Mr. Charles Robb, who at that date was the occupier and owner of Chatsworth, granted permission to the National Telephone Company, Limited, to erect a telephone pole in the grounds of Chatsworth. That permission was granted on these terms, "This grant extends from 1st November, 1906, till 1st November, 1907, and must be renewed annually. Notice of termination to be six months. The sum of ten shillings to be paid annually as rent." In virtue of this permission the pole was duly erected by the National Telephone Company, Limited. As from 31st December, 1911, the plant, property and assets of the National Telephone Company, Limited, were transferred to the Postmaster-General. In or about 1914 Mr. Robb erected in the grounds of Chatsworth, in close proximity to the pole, a building consisting of a garage and chauffeur's dwelling-house. The pole is situated one foot nine inches from the wall of that building and eight inches from the projecting eaves of the roof of the dwelling-house. In March, 1921, the respondent, Mr. Grimmond, acquired the property including the whole grounds and buildings, known as Chatsworth, from the trustees of the deceased Charles Robb, and is now owner and occupier thereof. By letter dated 28th May, 1921, the respondent gave notice to the Postmaster-General that he required the removal of the telephone pole. The Postmaster-General, it is stated in the note, "declines, in the public interest, to remove the said pole."

The respondent objects to the competency and relevancy of the application. He contends that in respect the pole is placed within ten yards of a dwelling-house, he, being owner of the dwelling-house entitled to possession, has under the Telegraph Act, 1863, sec. 22, sub-secs. (3) and (4), a definite statutory right to have the pole removed from its present position, and to have any question arising as to such removal determined in the manner provided in sec. 22, sub-sec. (5) of that Act.

In considering whether this contention is well founded, it is necessary to have regard to the scope and application of the several Telegraph Acts. The telephone pole was erected by the National Telephone Company, Limited, which was a company registered under the Companies Act, 1862, and not incorporated under any special Act. It is settled that a telephone company registered under the Companies Act,

1862, and not incorporated under any special Act, does not fall within the phrase " the company " in the Telegraph Act, 1863 (*Wandsworth Board of Works* v. *United Telephone Co.*, 1884, 13 Q.B.D. 904). The pole therefore was erected independently of the Telegraph Act, 1863, and that Act had no application until 31st December, 1911, when the plant, property and assets of the National Telephone Company, Limited, were transferred to the Postmaster-General. From the date of that transfer the whole provisions of the Telegraph Acts became applicable to the pole and wires at Chatsworth, and the respective rights of the Postmaster-General and the owner or occupier of Chatsworth were thenceforth subject to these Acts. Among these Acts was the Telegraph Act, 1892, which, in sec. 4, sub-sec. (1), provides that where a " telegraphic line "—which, under sec. 2 of the Telegraph Act, 1878, includes posts—of the Postmaster-General has been constructed, either before or after the passing of the Act, whether by him or a person through whom he claims, and has been constructed " independently of " or " without compliance with " the Telegraph Acts, 1863 and 1878, any owner or occupier whose consent would have been required or who would be entitled to require the removal of the line " may require the removal of such line, but until the removal is required in pursuance of this section the line shall be deemed to have been lawfully constructed." There follows a proviso which, as extended by the Telegraph Act, 1916, sec. 2, enacts that, in the case of a telegraph line constructed along a street or public road or placed upon or across any land or building, " secs. 3, 4 and 5 of the Telegraph Act, 1878, shall apply as if the requisition to remove were a failure to consent within the meaning of those sections." The expression " failure to consent " includes (sec. 9 of the Act of 1892) the withdrawal of a consent or the annexing of conditions thereto to which the Postmaster-General objects. These provisions, in my opinion, apply in terms to the present case. The telegraphic line (including the pole) was, as from the date of the transfer, a line " of the Postmaster-General." It had been constructed by a person through whom he claims, viz., The National Telephone Company, Limited. It had been constructed " independently of " the Telegraph Acts, 1863 and 1878 (*vide Wandsworth Board of Works* v. *United Telephone Co.*, cit. *sup.*). The landowner was a person who, if the line had been constructed in accordance with the Acts, would, under the terms on which his consent to the erection of the pole had been given, " be entitled to require its removal " on six months' notice. Accordingly, as from the date of the transfer of the line to the Postmaster-General, the respec-

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tive rights of the Postmaster-General and the landowner were that the landowner might require the removal of the line; that until the removal was required the line was deemed to have been lawfully constructed; that a requisition to remove was a "failure to consent"; and that, if removal was required and the Postmaster-General objected, there arose a difference to be determined in accordance with the procedure prescribed in secs. 3, 4 and 5 of the Telegraph Act, 1878. The fact that, since in or about 1914, the pole has stood within ten yards of a dwelling-house may, as the respondent contends, have furnished a new or separate reason—apart from the terms of the contract—in respect of which the occupier or the owner of Chatsworth is entitled to require its removal; but it does not take the case out of the ambit of sec. 4 (1) of the Act of 1892. That section, indeed, deals expressly not only with the case of a pole constructed "independently of" the Telegraph Acts, 1863 and 1878, but also with the case of a pole constructed "without compliance with" these Acts. Accordingly, taking it that, as the respondent maintains, the continuance, without his consent, of the pole *in situ* within ten yards of a dwelling-house is not in compliance with sec. 22 of the 1863 Act, and that he is entitled on that ground to require its removal, the procedure prescribed by sec. 4 (1) of the Act of 1892 and secs. 3, 4 and 5 of the Act of 1878, is none the less applicable to the difference which has arisen out of the respondent's requisition to remove the pole and the Postmaster-General's refusal to remove it. I may add that, in my opinion, the procedure for the adjustment of differences, which is prescribed in secs. 3, 4 and 5 of the Telegraph Act, 1878, applies—with three exceptions which are specially enacted in sec. 1 of the Telegraph (Arbitration) Act, 1909, in sec. 5 of the Telegraph Act, 1878, and in sec. 34 of the Telegraph Act, 1863, respectively—to all differences, specifically named or described as such in the various enactments, arising out of notices and counter-notices, given on one side or the other, under the authority of these enactments with respect to the alteration and removal of telegraph works. Such differences clearly include a difference arising out of a notice of removal given, under sec. 22 (3) of the Act of 1863, by an owner entitled to possession.

Accordingly, in my opinion, the respondent's objection to the competency of this arbitration is not well founded.

The case presented by the Postmaster-General is that the withdrawal of consent by the respondent is contrary to the public interest, and the crave of the Note is that power be given to the Postmaster-General to retain the telephone pole in its present position.

Sec. 1 of the Act of 1916 provides that the tribunal shall not give its consent to the placing of the line unless it is satisfied that the refusal or failure of the owner or occupier of the land or building to give his consent is contrary to the public interest. It is, as I read the Acts, the duty of the tribunal, in deciding whether to give its consent, to have regard to the whole circumstances of the case, including the public interest, the considerations set forth in sec. 1 of the 1916 Act and other special circumstances or considerations which, in the particular case, are relevant to the question at issue between the parties.

Under the terms of the existing contract the respondent has a contractual right to have the pole removed on six month's notice. The respondent, when the notice of removal of 28th May, 1921, was given to the Postmaster-General, did not know the terms of the permission granted by the deceased Mr. Robb and that notice is not in the form of a "notice of termination" under the contract on the expiry of six months. There has been lengthy negotiation and correspondence between the parties with regard to this pole, but the respondent was not informed of the terms of the consent, under which the pole was placed, until the present application was presented and Mr. Robb's letter to the National Telephone Company, Limited, dated 8th December, 1906 (No. 3 of process), was produced by the witness Mr. Hardie at the proof. It is, however, as I understand, not disputed that the terms and conditions on which Mr. Robb granted permission to the National Telephone Company, Limited, to erect the pole, continued, after the transfer of the plant to the Postmaster-General, to be the terms and conditions of consent between Mr. Robb and subsequently the respondent on the one part and the Postmaster-General on the other part. The suggestion of the witness Mr. Hardie that the agreement had "lapsed" and no longer existed, in respect that Mr. Robb did not demand, and the National Telephone Company, Limited, and the Postmaster-General had not paid the stipulated annual "rent," is clearly untenable. The obligations of the contract continued, after the transfer of the plant to the Postmaster-General, to subsist unaltered from year to year subject to this, that, in virtue of the Telegraph Acts, in the event of the landowner requiring the removal of the pole and the Postmaster-General objecting to its removal, a difference is deemed to have arisen and the tribunal has power to give a consent to the pole remaining on such terms and conditions as the tribunal thinks fit. Until the landowner requires removal, it would appear that, in the case of a pole placed on land in private ownership, the Post-

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master-General has no power, except by mutual agreement, to alter any term or condition of the contract; for sec. 4 (2) of the Act of 1892 applies only to a line along a street or public road and has not been extended to a line upon land in private ownership. When a requisition for removal is made and a difference arises, the tribunal has power to give its consent that the pole shall remain—a substituted consent which is binding on the landowner. The tribunal may give such consent whether the requisition to remove was, or was not, in accordance with the terms of the contract, but it seems to me that the tribunal, in deciding whether to give such consent, is not excluded from taking into consideration, among other circumstances, the terms of the existing contract. Further, it appears to me that where a contracting party—be it a public department or a private citizen—contends that adherence to the contract is contrary to the public interest, the *onus* lies on that party to establish that contention.

When Mr. Robb, in 1914, was about to erect the garage and dwelling-house he might—the telephone works having been transferred to the Postmaster-General prior to that date—have given notice under sec. 30 of the Act of 1863 requiring removal of the pole on the ground that its continuance would interfere with the "intended building." He did not adopt that course, and the inference is that he did not object to the continuance of the pole *in situ* and that he impliedly consented under sec. 22 (1) of the Act of 1863 to the pole being placed within ten yards of the dwelling-house. Under sec. 22 (1) of the Act of 1863 the consent to be obtained is primarily that of the occupier and, "if there is no occupier," then that of the owner. Mr. Robb was both occupier and owner. Taking it that his conduct implied a consent under sec. 22 (1) of the Act of 1863, a consent implied from conduct is to be interpreted in the light of the circumstances from which it is inferred and is not to be carried further than these circumstances warrant. Having regard to the language of sec. 22 (1) and the circumstances from which Mr. Robb's consent is inferred, it seems to me to be the fairer inference that his implied consent was a consent as "occupier." In that view his consent was effective only during the continuance of his occupation and, on his occupation coming to an end, the respondent, being the owner entitled to possession, has—in addition to his right of removal under the contract—a right to require removal under sec. 22 (3) of the Act of 1863, his right, in the one case as in the other, being subject to statutory adjustment in case of difference. However that may be the provisions in sec. 22 of the Act of 1863

clearly show—and this, to my mind, is their real importance in the present case—that the Legislature recognises that a telephone pole placed within ten yards of a dwelling-house is, or may be, objectionable to the owner or occupier of the dwelling-house and that he has, or may have, reasonable and proper ground for requiring its removal. The fact that the Legislature, legislating presumably in the public interest, has thought fit to enact these special provisions with regard to the placing of a telephone pole within ten yards of a dwelling-house, seems to me to render it more difficult than it might otherwise have been to accept the contention of the applicant that it is in the public interest that this pole should continue to stand within ten yards of a dwelling-house. The witness, Mr. Hardie, states (p. 7) that in "thickly populated districts" it is quite usual to have poles within ten yards of a house and not unusual to have them close up to a house. "We do not," he adds, "go there voluntarily; it is only when we are forced to." In a thickly populated district such a state of things, admittedly undesirable in itself, may become necessary, but in the present case this doctrine of necessity cannot reasonably be invoked. Giffnock is not a thickly populated district, but is a villa district in which each house stands in its own grounds —grounds which vary from half an acre to four acres in extent. Again it was argued that the respondent, having purchased the property of Chatsworth in the knowledge that the pole stood where it stands, cannot now object that the proximity of the pole to the dwelling-house is of the nature of a nuisance or interferes with the use and enjoyment of the dwelling-house. This argument cannot, in my opinion, be supported. The law, as laid down by Lord Halsbury in *Fleming* v. *Hislop*, 1886, 13 R. (H.L.) 43 at p. 49, is that the right of a man to complain of a nuisance is not diminished because the nuisance existed before he went to it, and that the rights are the same whether the man went to the nuisance or the nuisance came to the man.

The evidence of Mr. Scott, who is the district manager of the London and Scottish Assurance Corporation, Limited, and the adviser of that company as to burglary risks, is that, if the pole were not there the contents of the garage would be insured readily against burglary by any ordinary company at the normal premium rate of 5s. per cent., but that, in respect of the facility of access to the garage afforded by the pole as it stands, the hazard is so much increased that his company and most other insurance companies would decline the risk altogether and that, if they did accept the risk, it would be at a very special rate of premium, certainly not less than an additional £1 per cent. I see no

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reason to doubt the good faith or substantial accuracy of Mr. Scott's evidence; and no evidence was led to disprove or rebut it. In the garage the respondent keeps two cars, and the value of these two cars together is £1850. The proximity of the pole (as it now stands) to the garage has therefore, according to Mr. Scott's evidence, this result—that the premium, to be paid by the respondent, for the insurance of these two cars against burglary is increased by no less than £18 10s. per annum. At the hearing in the arbitration it was intimated that the Postmaster-General is willing to make such alterations in the construction of the pole as might be necessary to prevent it affording a means of access to the garage. There is no evidence before me to show whether it is practicable, if the pole remains where it stands, to prevent it affording such access or whether the devices, which, it is suggested, would secure that result, would be effective.

It is, I think, proved that the wires and their attachments to the pole cause noise which occasions substantial annoyance to, and seriously interferes with the reasonable comfort of, persons living in the dwelling-house in close proximity to the pole. Mr. Piggott, the chauffeur, who lives with his family in this dwelling-house, gave his testimony without, as it seemed to me, any desire or tendency to exaggerate. Chatsworth stands in an elevated situation exposed to the wind. Noises which are quite endurable during the day may cause serious discomfort when they go on continuously during the hours of the night. It was suggested by the witness Mr. Hardie—and it was intimated to me that the Postmaster-General is willing to give effect to the suggestion—that a remedy would be provided by fixing "silencers." Such silencers would, according to Mr. Hardie's evidence, get rid of any annoyance caused by the playing of the wind through the wires. "The silencer," he says, "does not affect the sound coming down the pole, just the sound from the wires." It is not clear on the evidence that this device would put an end to, or render negligible, the rattling noise caused by the attachments of the wires to the pole which, Mr. Piggott says (at p. 67), is a main source of the discomfort complained of.

It was stated on behalf of the respondent at the hearing that he is willing to give his consent to the pole being placed on Egidia Avenue, at the side of that avenue and on his own ground; that he is willing to give his consent to the wires passing over the grounds of Chatsworth; and that he is willing to give his consent to an intermediate or supporting pole being placed on his ground close to the boundary of his feu on the side opposite to Egidia Avenue. The re-

moval of the pole to Egidia Avenue (which in the proof is sometimes spoken of as Winton Avenue) would involve an addition of twelve yards to the span of the wires between the pole in its new position and the pole on the south west. It would mean that that span would be increased from 80 yards to 92 yards, and the evidence is that a span exceeding 70 yards is objectionably long. But that objection is obviated by the willingness of the respondent to consent to an intermediate or supporting pole being placed on his ground close to the boundary of his feu on the south west side. The erection of such an intermediate pole would, of course, mean an additional expense; but, according to Mr. Waring's evidence, the existing span of 80 yards is unduly long. Mr. Waring states that there is no engineering objection to the suggested intermediate pole and that the only objection to such an intermediate pole is the additional expense. The tribunal, if it gives consent, has power to impose such terms or conditions as it may think fit; but, as I read the Acts, if it refuses consent, it has no power to impose terms or conditions. But, in determining whether to give or to refuse consent and in weighing the considerations on the one side and the other, it seems to me to be an important element for consideration whether a refusal of consent would interfere with, or cause any permanent dislocation of, the telephone service. In view of the statement made as to the consents which the respondent is willing to give, I am unable to hold on the evidence before me that the refusal of consent in this case and the consequent removal of the telephone pole from its present position would interfere with the telephone service or would cause any dislocation of that service other than a merely temporary dislocation during the process of removing the pole.

Having regard to the considerations which I have indicated and to the whole circumstances of the case, I have reached the conclusion that the consent or "power" craved in this application falls to be refused.

J. M. I.

For applicant—Mr. A. N. SKELTON, advocate, instructed by Mr. P. Grandison Bridgett, Glasgow.

For respondent—Mr. ROBERT MEARNS, Pollokshaws.

SHERIFF COURT OF LANARKSHIRE.

No. 56.
Lanarkshire
Ross & Co. v Hind

Ross & Co., *Pursuers;* A. L. Hind, *Defender.*

Contract—Master and servant—Agreement in restraint of trade—Breach—Interdict.—Circumstances in which interdict refused against an employee who had left a firm and started business on his own account. *Observations* as to the necessity for specific averments on record to support application for interdict in such cases.

Contract—Writing—Printed note headings—Construction.—Held (distinguishing *Oakbank Oil Company* v. *Love & Stewart*, 1918, S.C. (H.L.) 54) that printed note headings could not be imported as contractual matter into an agreement written on the notepaper bearing them.

Ross & Co. used notepaper upon which was printed, *inter alia*, "Sole agents in Scotland for Ellams Duplicator Company, Limited," and also "Typewriter and supplies specialists." They engaged Hind as a traveller on 8th June, 1912, and Hind signed the following document, which was typed upon a sheet of Ross's notepaper:—"I, Alexander Lemuel Hind, 24 Stockwell Street, Glasgow, appointed traveller for Messrs. Ross & Co., agents for Ellams Duplicator Company, makers of duplicators and all typewriter accessories, hereby agree and bind and oblige myself not to start myself in the same business nor to enter the employment of any other firm carrying on the same business as Messrs. Ross & Co. in Scotland for the space of six months from the expiry of my engagement with the said Messrs. Ross & Co." The engagement lasted for nearly ten years, and terminated at 14th January, 1922. Hind started business for himself, and used a business card reading, "Hind & Co., office supplies specialists, 146 West Regent Street, Glasgow. Presented by A. L. Hind." The pursuers craved the Court "to interdict the defender (first) from carrying on either in his own name or in partnership with others the business of suppliers of typewriters, typewriting accessories, office stationery, and general office supplies in Scotland for the period of six months from and after 14th January, 1922, and (second) from entering or continuing in the employment of any firm or person other than the pursuers carrying on the business of suppliers of typewriters, typewriting accessories, office stationery, and general office supplies." The defender stated a plea that the

action was irrelevant as laid. In the following interlocutor the Sheriff-Substitute (FYFE) sustained this plea and dismissed the action:—

GLASGOW, 1*st March*, 1922.—Having heard parties' procurators on the closed record, sustains defender's first plea, recalls the interim interdict granted on 25th January, 1922, dismisses the action, finds pursuers liable in expenses, allows an account to be given in, and remits to the Auditor for taxation.

T. A. FYFE.

Note.—This is an action founded upon breach of an alleged agreement of 8th June, 1912, expressed in the letter of that date granted by defender (No. 7/1 of process). Assuming that document to constitute a mutual contract of service—(which is perhaps doubtful)—it is an agreement in restraint of trade.

Such agreements were formerly regarded as void at common law, as being in restraint of trade, and so contrary to public policy.

Later on, exceptions to that rule came to be recognised, but only in cases where the restraint was reasonable on the ground of special contract arrangement.

But each case depends upon its own circumstances. In agreements between an employer and an employee, the question always is whether the restraint sought to be imposed on the employee is wider than is reasonably necessary for the protection of the employer. If it is, then the law will not enforce it (*Mason* v. *Provident Clothing Company*, 1913, A.C. 724). In considering that question, such an agreement falls to be strictly construed, and will not be extended, in any event, beyond the express contract terms, as regards regards such elements, for instance, as time and geographical area.

In the analogous case of the sale of the goodwill of a business—which is a stronger case than a service contract—it is now well settled law that the sale of a goodwill does not exclude the seller from engaging in the same business. It only debars the seller from convassing the customers of the business which has been sold (*Dumbarton Steamboat Company* v. *Macfarlane*, 1 F. 993).

What was the agreement expressed in No. 7/1 of process? In my opinion that must be ascertained from the typewritten portion of that document alone. Pursuers want to import into it the printed words at the top of the sheet of paper upon which defender wrote his letter of 8th June, 1912—on the principle of the House of Lords decision in the case of *Oakbank Oil Company* v. *Love & Stewart*, 1918, S.C. (H.L.) 54. I do not think that case is applicable at all. In the

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Oakbank case the contract was constituted by an offer and acceptance. The offer was to supply goods over a year; and, on the top of the sheet of letter paper upon which the offer was written there was prominently printed in red ink—"All offers over a period are subject to stoppages through strikes, lockouts, &c.; and the right to cancel is reserved in the event of any of the countries from which our supplies are drawn becoming engaged in war."

That note embodied two well-known elements in commercial contracts—the strike clause, and the war reservation clause; and what the House of Lords held was that these contract stipulations were put before the buyer in such a position that they must be regarded as forming part of the terms offered in the body of the letter of offer.

But, in the present case, there is nothing on the paper (No 7/1 of process) of the nature of a contract clause, to which the buyer's attention is called, or which could reasonably be presumed to be imported into the agreement as a contract stipulation. All the printed matter on the document (No. 7/1) is descriptive merely—not in any sense contractual.

It is common ground that part of pursuers' business in 1912 was acting as agents for Ellams Duplicator Company, Limited, which company were makers of duplicators and typewriter accessories. I think the proper interpretation of defender's letter (No 7/1) is that he bound himself not, within six months of his leaving their service, to compete with them in this part of their business—a quite distinct part of their business, as pursuers' letter paper heading makes clear. It is not suggested on record that defender is doing anything which trenches upon pursuers' business of selling the productions of Ellams Duplicator Company, to which part of pursuers' business I think the letter (No. 7/1) alone refers.

If the intention had been that defender was not to carry on any kind of business whatever similar to that in which pursuers were engaged, it would have been a simple matter to have said so. There was no need to introduce any reference at all to pursuers being agents for the Ellams company. I think that the expression "the same business" in the fourth line of the letter (No. 7/1) refers back to the business described in the second and third lines, and cannot be extended to any other class of business which pursuers may carry on. This becomes clear, I think, if the letter itself is alone regarded, reading it as if it had been written on a clean sheet, and this, I think, is how it must be read, paying no regard at all to the printed matter which happens to be upon the paper, but is in no way imported into the obligations expressed in the letter itself.

So regarded, it is obvious that the restraint obligation was not necessary for the protection of the pursuers. So long as pursuers remained the "Sole Agents in Scotland for Ellams Duplicator Company, Limited," as their letter heading describes them to be, and as they are described in the body of the letter itself, they did not need the protection of this restraint obligation; and, if it was not necessary for their protection, it was void altogether. If, by the time the defender came to leave their service, the pursuers had ceased to be agents for the Ellams company, equally the obligation was unnecessary for their protection, and so was void; for, of course, the pursuers could not control the Ellams company. If *they* had elected after 14th January, 1922, to drop pursuers, and give their agency to defender, the pursuers could not have interfered either with the Ellams company or with the defender, for the pursuers would have ceased to have any interest at all.

Even supposing, however, that the letter (No. 7/1) is capable of being read in a broader sense than I have interpreted it, and that the expression in the third line of the letter "Makers of duplicators and all typewriter accessories" applies to pursuers, and not to the Ellams company, I do not think that pursuers have laid a relevant case. Their first crave is not that the defender be interdicted from canvassing their customers, but that he be interdicted from carrying on in Scotland "the business of suppliers of typewriters, typewriting accessories, office stationery, and general office supplies." But the letter (No 7/1) makes no mention of stationery and general office supplies, and at any rate there is no averment on record to support this crave. It is not enough to say that the defender is "carrying on a business of the same nature as pursuers' business." Nor is it enough to say that defender is "calling upon customers of pursuers and soliciting orders from them for the same class of goods as have been supplied by the pursuers." Such general averments do not give the defender notice of what he has to meet. Pursuers, when they make that averment, presumably know the customers and what defender has offered to sell them, and they must name customers, and specify goods. The condescendence is lacking in specification, and is insufficient to support a crave for interdict, which is only granted upon specific averment.

The second crave is to interdict defender from becoming an employee. But there is no averment at all to support this crave. It is not said that defender is proposing to become an employee or agent for a rival firm. What is said, indeed, is contradictory of that. It is said that defender has himself started to trade under the firm of "Hind & Co.,"

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and pursuers produce that firm's card (No. 8 of process) which, it is to be noted, says nothing about duplicators, or typewriter accessories, but indicates only that the firm's business is to sell "office supplies"—whatever that may mean. The pursuers do not attempt to put a meaning on it.

Interdict is for obvious reasons a form of action which peculiarly calls for very specific averments; and, in my view, the averments in this condescendene are nothing like specific enough to support a crave to interdict a man from earning his living—a kind of crave which Courts of law always very jealously regard, and only grant when it is made clear on record that it is necessary for protection against some real and substantial injury, which is being suffered, or is reasonably apprehended.

T. A. F.

The judgment was acquiesced in.

For pursuers—Mr. A. W. Hunter (Messrs. Boyd Auld & Hunter), Glasgow.

For defender—Mr. E. Rosslyn Mitchell (Messrs. Rosslyn Mitchell & Tullis Cochran), Glasgow.

No. 57.

Lanarkshire

Scottish Motor Traction Co., Ltd. v Hughes

Scottish Motor Traction Company, Limited, *Pursuers;* James Hughes, *Defender.*

Payment—Evidence—Clean receipt—Error.—In this action which was for payment of balance of a mercantile account, the defender produced and founded on a full and unqualified receipt by pursuers and pleaded payment. The pursuers were allowed a proof *prout de jure* as to the circumstances in which the receipt was granted, as a result of which it was *held* that the receipt had been fraudulently procured, and that pursuers were entitled to decree for the balance sued for.

Evidence—Writ—Parole—Payment.—Held that the terms of a receipt vouching payment in full of balance of a merchant's account may competently be rebutted by proof *prout de jure.*

The circumstances of this case are sufficiently stated in the interlocutor of the Sheriff-Substitute (Blair), which is annexed:—

June 2, 1922
Sheriff Blair

Glasgow, *2nd June*, 1922.—The Sheriff-Substitute having heard parties' procurators and considered the evidence finds in fact (1) that the pursuers are a large motor company carrying on business in Edinburgh and Glasgow, their office in Glasgow being at 44 Sauchiehall street; (2) that the defender is a coal merchant carrying on business at 10 Glebe street, Townhead; (3) that on or about 2nd September, 1921, the defender was owing to the pursuers the sum

of £53 0s. 8d. being the first item in the account annexed to the petition of £35 9s. 8d., and the second item of £17 11s.; (4) that defender ordered the goods mentioned in said second item of the account and the amount thereof £17 11s. was charged to him and later credited to him as he failed to take delivery thereof from pursuers, thus leaving a balance of £35 9s. 8d.; (5) that on 4th January, 1922, defender called on pursuers' manager, Charles S. Banks, and pleading temporary financial difficulty persuaded the said Charles S. Banks to enter into an arrangement with him whereby he was allowed to pay the balance then due, viz., £35 9s. 8d, by instalments; (6) that defender on last mentioned date paid the first instalment of £5 and arranged that he would pay each month thereafter a further instalment of as near £5 as he possibly could until the whole sum was paid off; (7) that by this payment the balance still due was reduced to £30 9s. 8d.; (8) that in the beginning of February, 1922, a statement of balance still due of £30 9s. 8d. was sent to the defender, and on or about 8th February, 1922, the defender's representative, a boy in his employment, called and handed an envelope from the defender to the said Charles S. Banks, per the hands of Alexander Veitch, shop assistant to the pursuers, containing the sum of £2 10s. in cash as a further payment to account of balance due by him to pursuers; (9) that said sealed envelope containing the money was opened by Charles S. Banks in the presence of said Alexander Veitch and found to contain only the sum of £2 10s. and not the sum of £30 9s. 8d. as alleged by the defender in his evidence and in his defences; (10) that the said sum of £2 10s. was taken by the said Charles S. Banks and handed by him personally to Miss Ross, pursuers' cashier; (11) that Miss Ross thereupon in consequence of the official adhesive receipt tags having become temporarily exhausted stamped the statement of account rendered accompanying the £2 10s. with the letter rubber stamp "for The Scottish Motor Traction Co., Ltd.," fixed a 2d. postage stamp thereon and signed her initials A. W. R. and the date, omitting by error to add the words and figures to account £2 10s. and deducting that amount from the old balance all conform to document No. 5 of process produced and founded on by the defender; (12) that the word "paid" appearing on said production was not written by Miss Ross, but has been written and added by some person while the document has been in defender's possession; (13) that the said document after it was stamped by Miss Ross was handed back to the defender's messenger; (14) the only sum which Miss Ross received as from the defender was the sum of £2 10s., and that the defender's story that he sent £30 9s. 8d. by messenger in full

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discharge of said balance is false; (15) that in law the document produced (No. 5 of process) is not a valid receipt and is not a valid discharge for the balance £30 9s. 8d. then due by defender; (16) finds that the balance still due by the defender after deducting the £2 10s. paid to account on 8th February, 1922, is £27 19s. 8d., accordingly decerns against the defender for payment to the pursuers of the sum of £27 19s. 8d. with interest as craved; finds the defender liable to the pursuers in expenses; allows an account thereof to be given in and remits the same to the Auditor of Court to tax and report.

P. J. Blair.

Note.—The only question is this case is whether the defender on 8th February, 1922, paid £2 10s. to account of the balance admittedly due then or whether he paid the whole balance £30 9s. 8d. in cash on that occasion. He produces the document (No. 5 of process) which he says is a receipt in full. I do not think it can be properly termed a receipt. It is merely a stamp initialled by Miss Ross, the cashier, and dated, although it is affixed to a statement of account rendered. Even if it is a complete receipt of the ordinary kind, in law I think it is settled that a complete receipt, unambiguous in its terms, can be rebutted on the ground of error or mistake. Miss Ross quite candidly admitted she made a mistake in not noting the amount paid, or noting that it was to account only; but she is quite positive, and I believe her, that the word "paid" is not in her handwriting and was not written by her. It has obviously, I think, been written by a different hand, a different pen, different ink and at a different time. Consequently it must have been done by some one and while in defender's possession.

If, as suggested, Miss Ross pocketed the money, which defender says he sent (all but the £2 10s. accounted for throughout pursuers' books which are properly kept in my opinion) is it the least likely that she would make things look worse for herself by adding the word "paid," which would to a certain extent be an admission that she actually got the full amount necessary to discharge the whole balance? The word "paid" in my opinion is a fraud. I do not need to trouble about Miss Ross's honesty. Her employers refuse to suspect her in the slightest degree: and I have no hesitation in saying that she struck me as a witness as honest and truthful as I have ever seen. Mr. Banks opened the envelope and took out £2 10s. only, all that was in it. Veitch saw him do so and saw that sum in his hand. Miss Ross says that all Mr. Banks gave her was £2 10s. Am I to hold that every one of these three is perjured?

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The same remark applies to Banks and Veitch as I have applied to Miss Ross. In my opinion their evidence is absolutely true and straightforward and their demeanour in the witness-box above reproach.

Now with regard to the defender, in my opinion it is a very different story. There is first the little trouble he had in paying off in full and through Mr. Banks' generosity the arrangement to allow him to pay up by instalments. He does not call as a witness the messenger who brought the money. He is very hazy and indefinite about how his £30 9s. 8d. was made up. He says there was a cheque from a man M'Queen of £11 10s. which he cashed at the bank and so put himself partly in funds, and also a cash payment by M'Queen to him of some £28 10s. He calls M'Queen as a witness to this. M'Queen does not produce the cheque, which he could have got, nor does he produce the counterfoil which he ought to have. M'Queen says the money passed in consequence of a sale between them on the exchange of two motor lorries. M'Queen produces no receipt from the defender to prove this, though the sums he says he paid were substantial, nearly £40. The defender keeps no books. First he said he had a bank account, and then he qualified it by saying that his bank account consisted of a deposit receipt for £30 in joint names of himself and his wife, and that his wife was a partner with him in his business. His own bill headings negative this, and he says that people who deal with him do not know of his wife's interest. He produces at the adjourned diet a business book relating to his income and expenditure which he says he made up last Sunday, the day before the first day's proof. I suspect it was written up yesterday or the day before. This is Wednesday. For sheer affrontery this takes a lot of beating. Mr. Banks is not far wrong when he calls this defender a "twister." I decline, on this man's unsupported and obviously untruthful tale in my opinion, to brand three respectable individuals—Mr. Banks, Mr. Veitch, and Miss Ross—with deliberate perjury. I have no hesitation in granting the pursuers their decree, and further, I would add that in the interest of at least passable purity in the witness-box in a Court of law the attention of the Procurator-Fiscal should be called to this case.

P. J. B.

The defender appealed to the Sheriff (A. O. M. MACKENZIE), who issued judgment as follows:—

July 14, 1922

Sheriff MACKENZIE

GLASGOW, 14*th July*, 1922.—The Sheriff having considered the cause refuses the appeal, adheres to the interlocutor of the Sheriff-Substitute dated 2nd June, 1922, com-

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plained of, and decerns; finds the defender liable to the pursuers in the expenses of the appeal; and remits the cause to the Sheriff-Substitute with power to decern for the expenses now found due.

A. O. M. Mackenzie.

Note.—The first question is whether the evidence of payment furnished by the receipt No. 5 of process could competently be rebutted by proof *prout de jure*. The Sheriff-Substitute has held that parole evidence could competently be led for this purpose, and I agree with his opinion. In England an improbative receipt appears merely to be regarded as *prima facie* evidence of payment and it is competent to lead parole evidence to prove that such a receipt has been signed in error (*Straton* v. *Rastall*, 1788, 2 T.R. 366; *Skaife* v. *Jackson*, 1824, 3 Barn. & Cress. 421; *Cesarini* v. *Bonzani*, 1859, 1 F. & F. 339 cp.; *Lee* v. *Lancashire & Yorkshire Railway Co.*, L.R. 6 Ch. 527). In Scotland the authorities are not quite so clear, but it has been held competent to lead parole evidence for the purpose of showing that a receipt of which the debtor had obtained possession was not delivered to him as an acknowledgment of money received (*Henry* v. *Miller*, 11 R. 713), and I think the law of Scotland is in consonance with the English authorities (*Gloag on Contract*, 847; *North British Railway Co.* v. *Wood*, 18 R. (H.L.) 27; *North British Railway Co.* v. *Marshall*, Guthrie's Select Cases (Second Series) 58).

The only other question is whether the evidence justified the conclusion in fact to which the Sheriff-Substitute came, namely, that the sum paid by the defender to the pursuers in February last was £2 10s. and not as he states £30 9s. 8d., and that question, I am of opinion, falls to be answered in the affirmative.

I am accordingly of opinion that the appeal falls to be refused and that the judgment of the Sheriff-Substitute must be affirmed.

A. O. M. M.

For pursuers—Messrs. Wright, Johnston, & Orr, Glasgow.
For defender—Mr. J. Neil Doherty, Glasgow.

No. 58.

Lanarkshire

Douglas *v* Dixon, Ltd.

William Douglas, *Pursuer;* William Dixon, Limited, *Defenders.*

Workmen's Compensation Act, 1906—*Workman under majority—Partial incapacity—First Schedule, secs.* 3 *and* 16.—A workman was injured by accident arising out of and in the course of his employment in 1915, when under twenty-one years of age. In an application in 1922 for review under sec. 16 of the First Schedule of the Act of 1906 it was admitted that the workman was still

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partially incapacitated, and it was proved that the difference between the average weekly wage he would probably have been earning at the date of review if he had remained uninjured and the average weekly wage he was actually then earning was more than £1. *Held* that as this difference represented the loss in wage-earning capacity sustained by him by reason of the accident the workman was entitled to an award of compensation at the minimum rate of £1 a week. *Observations* on the assessment of compensation under sec. 16 and sec. 3 of the Schedule respectively.

The following is the interlocutor of the Sheriff-Substitute (HARVEY):—

June 14, 1922
Sheriff HARVEY

LANARK, 14*th June*, 1922.—The Sheriff-Substitute, acting as arbiter under the Workmen's Compensation Act, 1906, having resumed consideration of the cause, finds in fact (1) that on 2nd March, 1915, the pursuer, when sixteen years of age, and when employed as an assistant bogieman by the defenders in their Wilsontown Colliery, Lanarkshire, was injured by accident arising out of and in the course of his employment by having his right thigh broken by the fall of a stone from the roof; (2) that he was paid compensation by the defenders as for total incapacity at rates increasing from time to time to 19s. a week until 18th November, 1918; (3) that at said date the pursuer's total incapacity ceased, and that he was given light work by the defenders at their coke ovens at a wage of £2 7s. a week; (4) that the defenders on said 18th November, 1918, suspended payment of compensation to the pursuer, and that the pursuer acquiesced in the defenders doing so; (5) that the defenders' coke ovens were closed down in March, 1921, and that for part of that month the pursuer was without work and received from the defenders a sum of £2 in name of compensation, and that since said payment he has received no compensation in respect of said injury by accident; (6) that the pursuer was on and after 24th March, 1921, and still is, partially incapacitated for work as the result of said accident, and that the only work, suitable to his limited capacity, available for him since said date and at the present time, is work at the coal-picking tables; (7) that with the exception of the period covered by the coal strike (1st April to 4th July, 1921), the pursuer has worked at the picking tables in the defenders' colliery since 24th March, 1921, and is at present working as a picker there; (8) that the present average weekly wage the pursuer earns as a picker is 16s. 8d., that the average weekly wage he would probably now be earning if he had remained uninjured is £2 2s. 1d., and that the difference between said probable

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wage and said actual wage is £1 5s. 5d. a week: Assesses compensation as for pursuer's partial incapacity at the rate of £1 a week, awards the pursuer compensation at said rate from 24th March, 1921, till further order; finds the pursuer entitled to expenses; allows an account of said expenses to be lodged in process, and remits the same, when lodged, to the Auditor of Court to tax and to report.

W. Harvey.

Note.—The parties are agreed that the pursuer is still partially incapacitated as the result of the accident to him on 2nd March, 1915, and that he is fit only for light work. The defenders did not dispute the date, 24th March, 1921, from which the pursuer claims that any compensation awarded to him should run, and both parties rightly regard this application as an application for review of the weekly payment of 19s. under sec. 16 of the First Schedule of the Act of 1906.

The defenders plead that compensation should remain suspended in respect that the pursuer "regained his earning capacity on 18th November, 1918," when he started work at the coke ovens at a wage of more than double the compensation of 19s. a week, which he was then receiving; and they plead, alternatively, that the pursuer is barred from insisting in his present claim by the circumstance that he then (November, 1918) acquiesced in his compensation being suspended. The pursuer did not regain his wage-earning capacity on 18th November, 1918, unless partial incapacity does not constitute incapacity; and the circumstances then existing seem to me to have nothing to do with the duty imposed on the arbiter by sec. 16.

It is the duty of the arbiter under that paragraph to ascertain and compare the wage the pursuer is actually earning at the date of review and the wage he would probably have then been earning if he had remained uninjured. Had he remained uninjured the pursuer in this case would in ordinary course now have been working as a miner at the face, or as an oncost worker at higher wages than a miner; and, taking the county rate, his probable earnings would now have been 8s. 5d. a shift or (with 5 shifts a week) £2 2s. 1d. a week compared with 16s. 8d., his actual weekly earnings as a picker. The difference between these weekly rates is 25s. 5d., and this difference is the measure of the loss in earning capacity caused by the accident to the pursuer (*Woodilee Coal and Coke Company* v. *M'Neill*, 1918, A.C. 43, 48; 1918, S.C. (H.L.) 1, 4). This is subject to the proviso in sec. 16, that the weekly sum awarded as compensation is not to exceed 50 per cent, of 42s. 1d., and not to exceed £1.

Decisions dealing with sec. 3 of the Schedule, several of which were cited in argument, seem to have only an indirect bearing on a question arising under sec. 16. The arbiter, in assessing compensation under sec. 3, has to consider three different rates of wages which may conveniently, as in the case of *Bevan* v. *Energlyn Colliery Company*, 1912, 1 K.B. 63, 70, be denoted by letters. He has to consider, first, the wage earned by the injured workman at the date of the accident—(hereinafter referred to as X); second, the wage which the injured workman earns or is able to earn at the date of the assessment of compensation—(referred to as Y); and third, the wage which the workman would have been earning at the date of assessment of compensation had he remained uninjured—(referred to as Z).

The case of the *Woodilee Coal and Coke Company* v. *M'Neill*, 1918, A.C. 43, 48, in which the case of Bevan was approved, lays down (which indeed is obvious), that Z minus Y represents the actual loss in wage-earning capacity sustained by the injured workman in consequence of the accident. Bevan's case decides that if Z is less that X owing to a general fall in wages, a less proportion of X minus Y is proper to be awarded under sec. 3 since the actual loss of wage-earning capacity, represented by Z minus Y, is less than X minus Y, or, in other words, since part of the difference X minus Y is not due to the accident, but to the fall in wages.

Consistently with this it was held in *Quilter* v. *Kepplehill Coal Company*, 1921, S.C. 905, that a general fall in wages (Z less than X), is not a relevant ground for demanding the increase of a weekly payment.

It seems to follow from the reasoning in Bevan's case that if there is no general fall in wages (*i.e.*, if Z is equal to or greater than X), the full difference X minus Y should (apart from other relevant circumstances), be awarded under sec. 3 since it is less than the actual loss of earning capacity sustained by the injured workman, subject, of course, to the prescribed limitation that the award is not to exceed one-half X, and not to exceed £1.

In an application for review of a weekly payment under sec. 16 in the case of a workman injured before reaching the age of twenty-one, the arbiter has to consider only two rates of wages, Y and Z, where Z represents, not the wage the workman would have been earning at the date of review if he had remained uninjured, but the wage he would probably in that case and at that date have been earning. "Probably" because it cannot be matter of certainty that he would have attained with age to a higher grade. As before, Z minus Y represents his actual loss in wage-earning

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capacity caused by the accident, and accordingly sec. 16 does not, like sec. 3, direct the arbiter to take a proportion of the difference, and it seems to follow that the arbiter should award the whole difference subject to the limit in the proviso that the sum awarded weekly is not to exceed one-half Z, and not to exceed £1.

W. H.

For pursuer—Mr. J. C. Allan (Messrs. Hay, Cassels, & Frame), Hamilton.
For defenders—Mr. W. T. Craig, Glasgow.

No. 59.
Lanarkshire
M'Calmont *v* M'Neil & Sons

John M'Calmont, *Pursuer;* C. B. M'Neil & Sons, *Defenders.*

Contract—Performance—Frustration of the venture—Apprenticeship—Failure of trade.—Held that an apprentice could not claim wages under his indenture or damages for breach, the contract having been frustrated owing to depression of trade due to foreign competition, in consequence of which British factories (including this particular employers' premises) had to close down.

An apprentice bottle blower sued his employers in the Glasgow Small Debt Court for wages since 31st December, 1921, or alternatively for the penalty under the indenture. The employers answered that they, in common with all other factories, had been compelled to close down at 31st December because the British bottle-making industry had been killed by foreign competition. The Sheriff-Substitute (Fyfe) issued the following written judgment:—

June 26, 1922
Sheriff Fyfe

Glasgow, 26*th June*, 1922.—Having heard parties' procurators and considered the proof, finds (1) that pursuer was an indentured glass bottle-blower apprentice with defenders, serving a five-years' apprenticeship, as from 23rd February, 1920; (2) that in December, 1921, defenders posted a notice intimating that their works would be closed at 31st December, 1921; (3) that this was necessitated by depression in trade and foreign competition having rendered it impossible longer to continue the manufacture of bottles in British factories; (4) that, for the same reason, the closing of bottle factories in Scotland was general; (5) that the defenders' factory still remains closed: Finds in law that pursuer's contract with defenders, having been frustrated from causes beyond defenders' control, they are not bound to pay pursuer wages after 31st December, 1921, and are not liable in penalty for breach of the apprenticeship indenture; therefore assoilzies the defenders; finds no expenses due to or by either party.

T. A. Fyfe.

Note.—The novel question which is raised in this case is, briefly, whether the doctrine of frustration of contract applies to a contract of service. Numerous cases arose out of the war of commercial contracts being frustrated by ships being sunk, and other occurrences, and it is now well settled commercial law that a contractor is excused from the performance of a contract, where circumstances emerge during the currency of the contract which render the performance of it impossible. I do not see any reason why that doctrine should not be applied to a service contract.

What has happened is that the British bottle manufacturing industry has been killed by foreign competition—mainly from Germany. The defenders have had to close their works, and this is not personal to defenders, for all the bottle manufacturers in Scotland, who produce for the open market, have had to close down. Only a very few remain, who have a special domestic outlet for their manufacture, such as works in connection with bonded warehouses. The open market is flooded with foreign bottles, offered on sale at a price less than the British cost of production.

In these circumstances, the defenders had, regretfully, to suspend all their employees at 31st December, 1921, including six apprentices, of whom the pursuer is one. If they could carry on their factory, defenders would gladly continue to employ and train him. Defenders have all along been willing to grant him a clearance certificate for the time he served with them, in order that pursuer may, if he can, find employment elsewhere. Pursuer's proposition is that, although they have no work to offer him, defenders are bound to go on paying him wages. This is quite an unreasonable attitude. When misfortune overtakes a trade, it falls where it lights. The pursuer, like thousands of others, took the risk of the trade he had selected failing. Work is the counterpart of wages, and where there is no work there can be no wages. Nor is the pursuer's alternative claim for the indenture penalty in any better position. The defenders were liable for that penalty only if they broke the contract. But they have not broken it. Owing to causes beyond their control, it has become what the law terms a frustrated contract, which means that the situation now is as if the contract had never existed.

Of course it must always be remembered that "frustration" is a relative term, and that each case must be viewed in the light of its own circumstances. An apprenticeship contract belongs to a class breach of which the law will not regard lightly. There may be many varieties of circumstances in which such a contract ceases to be operative. Trade might fail, for instance, in one particular work, whilst

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generally the trade was quite active; or methods of production might be introduced in one factory, which rendered the work of an apprentice unnecessary to his individual employer. I desire emphatically to say that I am not laying down any general principle, or expressing any general opinion, as to when, or how, an apprenticeship contract may be justifiably ended by either the employer or the apprentice. Certainly neither can end it merely because it has become his personal interest to do so. Such a contract must be ended of mutual consent, or for sufficient reason. I am deciding no more here than that, upon the evidence led in this particular case, I am satisfied that this particular contract was frustrated, and that is a good defence to the pursuer's claim.

T. A. F.

For pursuer—Mr. R. M'Dowall, Glasgow.
For defenders—Mr. Donald C. C. MacFarlane, Glasgow.

SHERIFF COURT OF AYRSHIRE.

No. 60.
Ayrshire
Boyle v Ayr Town Council

Peter Boyle, *Pursuer;* Town Council of Ayr, *Defenders.*

Reparation—Landlord and tenant—Boundary fence—Substituted fence erected by tenant for his own purposes—Damage caused by fence blown away by gale.—The tenant of a field, who was a breeder of horses, removed for his own purposes, but with the consent of the landlord, a stob and wire fence which bounded the field from the public road and erected in its place, at his own expense, a close-boarded fence over 6 feet high. Thereafter the field was sold by the landlord and the purchaser granted a new lease to the tenant. Part of the fence having been carried away by a gale of wind was thrown against and damaged neighbouring property. *Held* that the fence was the property of the owner of the field, and that he was liable for the damage.

In this case the pursuer sued the defenders for the expense of repairing damage caused to the gateway and parapet wall of his house by the fence in a field belonging to the defenders on the other side of the road having been blown against them. The facts of the case are sufficiently detailed in the following interlocutor of the Sheriff-Substitute (Broun):—

April 9, 1921
Sheriff Broun

Ayr, *9th April*, 1921.—The Sheriff-Substitute, having considered the cause, finds in fact (1) that by missive of lease, dated 10th and 14th November, 1908, James Archibald Campbell of Craigie leased to John M'Guigan, trainer of racehorses, Ayr, the field known as Blackhouse Field lying

on the west side of Craigie Road, Ayr, at a rent of £17 13s. 6d., afterwards reduced to £16 10s. per annum, the tenancy to be terminated on either side by written notice given two months before any Martinmas term; (2) that about the end of 1908 the said John M'Guigan, with the consent of the said James Archibald Campbell, for the purpose of keeping brood mares in the said field and preventing people trespassing thereon and interfering with the mares and their foals, removed the stob and wire fence belonging to the landlord between the said field and Craigie Road and erected in its place, at his own expense, a close-boarded fence; (3) that the said fence was about 100 yards long and 6 feet 6 inches in height with upright wooden posts at 5 or 6 feet intervals driven 2 or 3 feet into the ground with a wooden rail top and bottom, to which boards close together forming a smooth surface on the side next the road were fastened with ordinary nails, and where the ground sloped down from the road to the level of the field, which it did for about 20 yards, the level of the field at this part being 4 or 5 feet below the road, and the slope being about 11 feet 6 inches, stays were nailed between wooden stobs in the field and the upright posts of the fence; (4) that thereafter the said John M'Guigan repaired the said fence at his own expense, his last repair being about March, 1920; (5) that by disposition, dated 30th November, and recorded 1st December, 1920, the said James Archibald Campbell sold to the defenders the said field, including the footpath 7 feet wide outside the said fence along Craigie Road, with entry at Whitsunday, 1920; (6) that by notice dated 6th August, 1920, the law agents of the said James Archibald Campbell and the defenders gave notice to the said John M'Guigan requiring him to remove from the said field at the term of Martinmas, 1920; (7) that by missive of lease, dated 19th October and 8th and 11th November, 1920, the defenders leased the said field to the said John M'Guigan for the period from Martinmas, 1920, at the former rent on condition that he would give up the field at any time when called upon by the defenders; (8) that the dwelling-house belonging to the pursuer is on the east side of Craigie Road, opposite the said field; (9) that during a gale on 16th November, 1920, a section of the said fence extending to about 19 yards at a part where the ground slopes down from the roadway to the level of the field opposite the pursuer's house was blown down and projected into the roadway; (10) that on the same day the Ayr burgh surveyor, acting for and on behalf of the defenders, filled up the gap made by the gale in the said fence by putting up a stob and wire fence consisting of five posts

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and three strands of wire; (11) that during another gale on 3rd December, 1920, another section of the said fence, extending to about 19 yards, at a part where the roadway is either level with the said field or not much above it, was blown across Craigie Road against the gateway and parapet wall of the pursuer's house, causing damage to the pursuer's property to the extent of £30; (12) that on 4th December, 1920, the said burgh surveyor, acting for and on behalf of the defenders, repaired the said fence by putting a wire along the upright posts left standing in the gap and nailing a portion of the boarding to the posts; (13) that neither after the gale of 16th November nor after that of 3rd December did the said John M'Guigan make any repairs on the said fence and the defenders never asked him to do so nor charged him for the repairs which they themselves had made; (14) that the said gale of 3rd December, 1920, was not of such an unprecedented character as to amount to *vis major* causing the damage done to the pursuer's property to be a *damnum fatale;* and (15) that at the time when the defenders bought the said field from James Archibald Campbell and on 16th November and 3rd December, 1920, the said fence was in an unsafe condition on account of the wood having become rotten and the nails which held it together having become loose: Finds in law (1) that the said fence is the property of the defenders; (2) that the said damage done to the pursuer's property on 3rd December, 1920, was caused by the negligence of the defenders in (*a*) not examining the said fence and renewing or strengthening it before letting the field to the said John M'Guigan, and (*b*) not examining and renewing or strengthening the said fence after its unsafe condition was brought to their notice by the gale of 16th November, 1920; and (3) that the defenders are liable to the pursuer for the damage done to his property as the result of their said negligence: therefore grants decree against the defenders in favour of the pursuer for the sum of £30 with interest as craved in the initial writ; finds the defenders liable to the pursuer in expenses; allows an account thereof to be given in; and remits the same, when lodged, to the auditor to tax and to report.

James C. C. Broun.

Note.—After consideration of the case I have come to the conclusion that the defenders are liable to the pursuer for the damage done to his property. The amount of the damage is not in dispute.

I think it is impossible to contend successfully that the damage was due to a *damnum fatale*. Even during my own stay in Ayr, I have known of worse gales than that

of 3rd December, 1920. As a rule the storms last a long time and are at their worst during the night, while in this case the gale came on suddenly in the forenoon and soon blew over. But such a difference does not make the gale a *damnum fatale*.

As regards the ownership of the fence, I am of opinion that it belonged to Mr. Campbell and was transferred to the defenders by the terms of their disposition. The fence was no doubt put up by Mr. M'Guigan for his own benefit and not for the permanent improvement of the field. But it was with the knowledge of the landlord substituted by the tenant for a fence which belonged to the landlord and was there when the tenant entered on his lease. It superseded a boundary fence already on the field. In such a case the new fence becomes the property of the landlord (*Duke of Buccleuch* v. *Tod's Trustees*, 18th July, 1871, 9 Macph, 1014). This state of the law is recognised by statute in the Agricultural Holdings Act, 1908, which by sec. 20 enacts that, *inter alia*, any fencing affixed to a holding by a tenant shall be his property and removable by him unless it is affixed in place of another fence belonging to the landlord. No doubt the defenders, before buying the field, were told by the landlord's agents that the fence belonged to Mr. M'Guigan, but in a question with a third party I do not think that can exonerate them. The fence is not specially excluded from the disposition, and I think it was the duty of the defenders when they purchased the field to make sure that this boundary fence did not in law pass with the property which would have been a most exceptional position for any boundary fence to be in. In a question with a third party those legally responsible for the damage done by the dangerous state of their property cannot be excused by saying that they were told that the things which proved to be unsafe did not belong to them and that they had made no further inquiry.

The defenders will be liable only if they knew or ought to have known of the unsafe condition of the fence. I think it is proved that they ought to have known of its unsafe condition and that they have failed in the obligation to look after their property with reasonable care. In the first place they failed to inspect it and see if it was in a safe condition when they granted the lease of the field to Mr. M'Guigan. This lease was really a new lease with a different landlord and a different duration and ish. If the defenders had inspected the fence and handed it over to Mr. M'Guigan in a safe state, it may be that the responsibility would have been on Mr. M'Guigan to keep it in that condition till his lease ended. But this not having been

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done, I do not think the defenders can free themselves from responsibility to the pursuer by blaming Mr. M'Guigan.

In the second place I am of opinion that on another and distinct head negligence resulting in the damage complained of has been brought home to the defenders. The date of the defenders' entry to the field was Whitsunday, 1920. Thereafter on 16th November a gale blew down a part of the fence. On the same day the staff of one of their departments put up a stob and wire fence where the blown down portion had stood. In doing so their attention must necessarily have been drawn to the unsafe condition of this fence bounding the defenders' property, and steps should have been taken to see that the remaining portion was put into a safe state. This renders it impossible for the defenders to plead successfully that they had no knowledge of the unsafe condition of the fence.

J. C. C. B.

On appeal the Sheriff (Lyon Mackenzie) adhered in the following interlocutor:—

Feb. 7, 1922
Sheriff Lyon Mackenzie

Ayr, *7th February*, 1922.—The Sheriff, having resumed consideration of the cause, refuses the appeal, adheres to the interlocutor of the Sheriff-Substitute of 9th April, 1921, complained of, and decerns; finds the defenders liable to the pursuer in the expenses of the appeal, and remits the cause to the Sheriff-Substitute.

W. Lyon Mackenzie.

Note.—The learned Sheriff-Substitute has so clearly and exhaustively set forth in his interlocutor the facts of the case that it is unnecessary to repeat them. The difficulty which had occurred to me of deciding this action without Mr. M'Guigan being called as a defender, I am satisfied as a result of the further hearing, has no substance.

On the merits of the case I agree with the conclusions arrived at by the learned Sheriff-Substitute.

With regard to the contention that the damage was caused by a *damnum fatale* I consider the evidence falls far short of proving such a state of facts. The real difficulty of the case arises as to the ownership of the fence. After repeated consideration of the proof and the various documents produced, I am satisfied that the fence erected by Mr. M'Guigan must be held to be of the nature of a substituted fence and the property of the defenders, in which case they are clearly responsible for its condition.

Further, having regard to the action of the defenders in repairing the fence when it was partially blown down on 16th November, 1920, it appears to me that by their actings they are barred from repudiating ownership thereof or pleading ignorance of its condition. As I entirely agree

with the learned Sheriff-Substitute, I have refused the appeal with expenses.

AYRSHIRE
Boyle *v* Ayr Town Council

W. L. M.

For pursuer—Mr. DAVID H. TAIT (Messrs. Ranken & Tait), Ayr.
For defenders—Mr. R. G. COCHRANE, for Mr. P. A. Thomson, town-clerk, Ayr.

SHERIFF COURT OF RENFREW & BUTE.

THE KILMACOLM HYDROPATHIC COMPANY, LIMITED, *Pursuers;* JAMES HALL, *Defender.*

No. 61.
RENFREW AND BUTE
Kilmacolm Hydropathic Co., Ltd. *v* Hall

Landlord and tenant—Lease—Breach of stipulation—Irritancy.—Under lease between pursuers and defender, the latter undertook to supply pursuers' hydropathic establishment with supplies of fresh milk as required. This stipulation was not among those which were fenced by the irritant clause of the lease. Circumstances in which *held* that pursuers' averments as to defender's breach of this obligation did not entitle them to declarator of irritancy and removing against him. *Observations* as to (1) the distinction between declarator of irritancy legal or conventional, and declarator of forfeiture of possession in respect of breach of a stipulation in a mutual contract of lease; and (2) whether such an obligation in a lease as was here in question entitled the landlords to put an end to the lease or merely claim damages in respect of non-performance of that particular obligation. *Obiter*—"Moreover the principles governing the right to rescind an ordinary contract are, in their application to the relation of landlord and tenant in an agricultural lease, subject to important qualifications; for the incidents of such a contract of lease and the tenant's right of possession thereunder are specifically regulated and protected by law."

The subjoined interlocutors of the Sheriff-Substitute (WELSH) and the Sheriff (IRVINE) sufficiently state the facts of this case and the contentions of parties:—

Dec. 16, 1920
Sheriff WELSH

GREENOCK, 16*th December*, 1920.—The Sheriff-Substitute, having heard parties' procurators and considered the closed record, finds that it is admitted—(1) that the pursuers are heritable proprietors of the lands and farm of Overton, in the parish of Kilmacolm and county of Renfrew, and the defender is tenant of said lands conform to lease dated 30th October and 18th November, 1918, entered into between the pursuers and the defender for five years from and after the term of Martinmas, 1918; (2) that article 6 of said lease provides—"The tenants bind themselves at all times to keep a sufficient stock on the lands hereby let,

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Sheriff Welsh

and to labour, crop, and manure the said lands in all respects agreeably to the rules of good husbandry, but at least one-half of the ground is to remain in grass. Further, the tenants shall be bound to supply to the landlords' hydropathic establishment fresh milk of the best quality and in quantities as the landlords may require during the period of this lease—the price, if not controlled by the Government, to be an ascertained current wholesale price for institutions"; (3) that the defender has failed to supply milk to the pursuers' hydropathic establishment in terms of said lease: Finds in law in these circumstances that the defender has failed to implement a material and essential condition of the lease, and that the pursuers are entitled to rescind the lease, and that the same is now null and void; therefore repels the defences, and ordains the defender within twenty-one days from the date hereof to flit and remove himself, his family, sub-tenants, cottars, and dependants with their cattle, goods, and gear furth and from the lands and farm of Overton in the parish of Kilmacolm and county of Renfrew, and to leave the same void and redd under pain of ejection; finds the defender liable to the pursuers in expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report.

John A. Welsh.

Note.—When the defender entered into the lease of the lands and farm of Overton he bound himself by article 6 thereof to supply to the landlords' hydropathic establishment fresh milk of the best quality, in quantities as the landlords might require during the period of the lease. On 18th August, 1920, the defender was convicted at Greenock Sheriff Court of having supplied milk to the pursuers on or about 18th July, 1920, which was deficient to the extent of 33 per cent. in milk fats, and was fined £5. On 2nd August, 1920, the defender informed the pursuers by letter that "as I am putting away all the dairy cows" no further deliveries of milk would be made after 6th instant. Thereafter on 5th August, 1920, the defender by letter informed the pursuers that he would continue the supply of milk till the end of August. The pursuers thereupon on 3rd and again on 15th September, 1920, intimated by letter to the defender that on account of his breach of article 6 of the lease he would be required to remove at Martinmas, 1920. These notices were addressed to "Mr. James Hall, West Glen Farm," and, in error, referred to the defender as tenant of "West Glen Farm." On 21st September the defender wrote stating that "the hydropathic can have milk supplied once daily." The pursuers then intimated by letter

of 23rd September, 1920, that the defender would be required to remove from the lands and farm of Overton at Martinmas, 1920. The defender did not remove at Martinmas, 1920, and the present action has accordingly been brought.

It is, I think, clear that the defender was in breach of his contract with the pursuers regarding the supply of milk. He attacks the relevancy of the action on the ground that the crave of the initial writ opens with what is described as a "declarator of irritancy" for which, it is maintained, the lease gives no warrant. Now it may be conceded at once that the stipulations in article 6 of the lease are not fenced by an irritant clause, such as is to be found in article 10 of the lease. But the crave must be read in the light of the admitted facts, and so reading it, I think the phrase "incurred an irritancy of the said lease" is a paraphrase of the expression "the lease is now null and void," and means that the defender having failed to implement the terms of the lease, the landlord has now a right to put an end to the contractual relations between the parties. In other words the crave by the word "irritancy" does not mean to infer that the lease provides an irritancy, settled conventionally by the parties; but that breach of contract on the defender's part has given the pursuers the right to rescind the contract. If that view be correct the defender's argument is unsound.

The question then arises whether the stipulation in article 6 of the lease is a material and essential one, as distinguished from a minor stipulation. There can be no doubt that the stipulation is an important one, made for the purpose of securing for the pursuers' hydropathic establishment a regular supply of the best quality of fresh milk from one of their own tenants. It is most necessary that an establishment of this nature should have a supply of the best milk, and I have no hesitation in coming to the conclusion that the stipulation in question is a material and essential one. What then are the rights of the pursuers? In the case of *Turnbull* v. *M'Lean & Co.*, 1874, 1 R. 730, Lord Justice-Clerk Moncreiff said, when dealing with the law regarding mutual contracts—"... (3) that where one party has refused or failed to perform his part of the contract in any material respect the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether—except in so far as it has been performed." In the case of *Davie* v. *Stark*, 1876, 3 R. 1114, the same judge stated—"The other party is entitled either to refuse implement until the stipulations in his favour have been fulfilled, or, provided that the latter are

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material and essential, to rescind the contract altogether. Recission, no doubt, is a strong measure, and is only competent where the stipulations violated are material or essential." The stipulation in article 6 of the lease being, in my view, a material and essential one, and it having been violated by the defender, the pursuers are entitled to rescind the contract between them and the defender. The defender's right to remain in possession of the subjects let depends upon the continuance of contractual relations between him and the pursuers. When these are ended, his right to possess is ended also.

The pursuers are, in my view, entitled to the remedy which they seek. There is, in my judgment, no relevant defence stated to the pursuers' case, and they are entitled to decree with expenses.

J. A. W.

Feb. 26, 1921

Sheriff Irvine

Greenock, 26*th February*, 1921.—The Sheriff, having considered the cause, recalls the interlocutor of the Sheriff-Substitute of 16th December, 1920, appealed against; sustains the first plea in law for the defender; dismisses the action; finds the pursuers liable to the defender in his expenses of the cause and of the appeal; allows an account thereof to be given in; remits the same, when lodged, to the Auditor of Court to tax and to report; and remits the case to the Sheriff-Substitute.

J. M. Irvine.

Note.—The Kilmacolm Hydropathic Company, Limited, the pursuers in this action, by the lease (No. 7 of process), let the farm of Overton to the defender. The farm, which extends to about seventy acres, is partly arable and partly pastoral. The lease was for five years from Martinmas, 1918, as regards the arable lands, and five years from Whitsunday, 1919, as regards the other subjects let. Article 6 of the lease, after stipulating that the tenant is to keep, at all times, a sufficient stock on the lands and to labour, crop, and manure the lands agreeably to the rules of good husbandry, and that at least one-half of the ground is to remain in grass, provides further that the tenant "shall be bound to supply to the landlords' hydropathic establishment fresh milk of the best quality and in quantities as the landlords may require during the period of this lease—the price, if not controlled by the Government, to be an ascertained current wholesale price for institutions."

The pursuers allege that the defender has failed to implement the obligations incumbent upon him under the clause which I have quoted from article 6 of the lease, and, in respect of this alleged contravention, they crave in this

action to have it declared that the defender "incurred an irritancy of the said lease and that the said lease with all that has followed thereon is now null and void," and to have him ordained summarily to flit and remove from the farm under pain of ejection.

There are averments by the pursuers that the milk supplied to them by the defender during the summer of 1920 was not of the quality stipulated in article 6 of the lease, and the pursuers, in condescendence 3, allege or maintain that they would have been entitled on that ground to terminate the lease. But the ground on which—as set forth in their letters of 15th and 23rd September, 1920—the pursuers actually proceeded in intimating to the defender that they were to terminate his lease as from Martinmas, 1920, and on which they now maintain that they are entitled to declarator of irritancy and decree of removing, is not that the milk supplied to them during the summer of 1920 was inferior in quality, but that the defender, in letters of date 2nd and 5th August, 1920, informed them that no further deliveries of milk would be made by him to them after the end of August, 1920.

The letters of 2nd and 5th August, 1920, were written by the defender's brother, but it is admitted that they were written with the knowledge of the defender. The letter of 2nd August was in these terms—"As I am putting away all the dairy cows the last milk delivered to you will be on Friday first, 6th inst." The letter of 5th August was in these terms—"Referring to my letter of 2nd inst., I hereby give notice that I will continue to supply you with milk till the end of August, 1920." The pursuers treated these letters as a definite and final intimation by the defender that he did not intend, after the end of August, 1920, to perform his obligations under article 6 of the lease, and took up at once the position that they were entitled, in consequence of this intimation, to terminate the lease. Accordingly they, in letters of date 3rd, 15th, and 23rd September, 1920, gave him notice that "in view of the fact that you have declined to implement clause 6 of your lease . . . in respect that you will not supply in future fresh milk to the hydropathic company, they must terminate your lease as from Martinmas, 1920." Meantime the defender, in a letter of date 21st September, 1920, informed the pursuers that "the hydropathic can have milk supplied once daily"; and again, on 6th October, 1920, he wrote—"I have intimated to you that I intend fulfilling the terms agreed on in my lease." In reply the pursuers, on 9th October, 1920, wrote—"Owing to your refusal previously to supply milk, our clients had to con-

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tract elsewhere for their supply of milk, and they must, therefore, adhere to the position taken up" in their previous letters.

It is, I think, open to question whether the statements made in the letters of 2nd and 5th August, written by the defender's brother, had in view merely temporary conditions affecting the supply of milk or whether these statements necessarily lead to the inference that it was, at the time the letters were written, the defender's intention permanently to give up keeping dairy cows and to stop supplying milk to the pursuers. Statements made by a contracting party before the time for performance has arrived with respect to his future intention are not to be treated as a repudiation by him of his contractual obligations unless they are incapable of a less unfavourable construction. Mere expressions of unwillingness to perform or of doubts of ability to carry out the contract are not construed as intimating a definite refusal to perform or as constituting an anticipatory breach of contract (*Thornloe* v. *Macdonald & Co.*, 1890, 29 S.L.R. 409). If the inference that the defender intended permanently to stop supplying milk to the pursuers after the end of August, 1920, is not a necessary inference from what the defender's brother wrote on 2nd and 5th August, it is not an inference which the pursuers were, or the Court is, entitled to draw (per Lord Esher, M.R., in *Johnstone* v. *Milling*, 1886, 16 Q.B.D. 460 at p. 468). I do not find it necessary to determine whether that is, or is not, a necessary inference from these letters of 2nd and 5th August; for, even assuming that the defender, at the time when his brother wrote these letters, intended to refuse all further performance after the end of August, 1920, or that his brother made use of expressions entitling the pursuers to suppose that he did so, I do not consider that the pursuers are entitled to the remedy craved in this action.

Under the Act of 1449, as interpreted by a long series of decisions, a lease of ordinary duration, when the tenant has entered into possession, is a real right or, at least, has many of the attributes and privileges of a real right. "A lease by the law of Scotland is a personal contract; and the entry of the intended tenant upon the property contracted to be demised is equivalent to seisin, and the right thenceforth becomes a real right" (per Lord Westbury in *Campbell* v. *M'Lean*, 1870, 8 M. (H.L.) 40 at p. 46). The right of the tenant can be brought to an end by an irritancy, legal or conventional. The legal irritancies are few in number and are regulated by the Act of Sederunt of 1756, as amended by the Agricultural Holdings Act, 1908. On the other hand no limit is set to the number of conventional irritancies;

for the parties may adject this sanction to any stipulation in the lease and, in case of a breach of the stipulation, can enforce the sanction. But no case was cited—nor have I been able to discover any case—in which the breach of an obligation undertaken by the tenant has been held to entitle the landlord to a declarator of irritancy, in the proper legal sense of that term, in respect of a past act of contravention unless the breach was one inferring an irritancy *ex lege* or unless the lease contained an unambiguous provision that the breach of the particular obligation was to bring the lease to an end. In the present lease, in article 10, the parties expressly stipulate that in certain events, or on the tenant doing, or failing to do, certain things, the lease shall, in the option of the landlords, become *ipso facto* void and null; but the breach by the tenant of the obligation incumbent upon him under article 6 to supply milk to the landlords' hydropathic establishment is not one of the enumerated events or things to which this drastic sanction is attached. It would not, then, I think, be consistent with the established doctrines of law to hold or declare that the defender, by failing to supply milk as stipulated in article 6, incurred an irritancy of the lease. In *Hamilton* v. *Hamilton*, 1845, 8 D. 308, a declarator of irritancy against a tenant for failure to implement a condition of the lease which was not fenced with an irritant clause was expressly held to be incompetent. In that case, at p. 311, Lord Mackenzie observed—"A lease cannot be irritated except in virtue of a conventional irritancy contained in it, or of a statute which provides an irritancy in certain events."

The Sheriff-Substitute has dealt with the action as a declarator of rescission or dissolution of the contract of lease as distinct from a declarator of irritancy. I have some doubt whether, having regard to the terms of the crave, it is legitimate to treat the action otherwise than as a declarator of irritancy and removing. Moreover the principles governing the right to rescind an ordinary contract are, in their application to the relation of landlord and tenant in an agricultural lease, subject to important qualifications; for, as I have pointed out, the incidents of such a contract of lease and the tenant's right of possession there under are specifically regulated by law. It has, however, been recognised, *e.g.*, in *Edmond* v. *Reid*, 1871, 9 M. 782, that there may be circumstances in which, though the lease does not contain any forfeiting clause, a landlord may have it declared that the tenant has forfeited his right of possession. In Bell's Principles, at sec. 1249, it is laid down that "when a lease is to be forfeited *extra ordinem*, and without any forfeiting clause, it must be done by declarator

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before the Court of Session." It may then be satisfactory—assuming that such a declarator is now competent in the Sheriff Court—to consider the action from this point of view.

The case which goes furthest in the direction of recognising that a breach by a tenant of a condition not fenced with an irritancy may entitle the landlord to declarator that the tenant's right of possession is forfeited is *Edmond* v. *Reid*, 1871, 9 M. 782, to which I have already referred. In that case the lease of a farm contained a clause binding the tenant to reside personally on the farm. This condition was not fenced by any clause of irritancy. The landlord brought an action concluding for declarator that the tenant was bound to reside on the farm and that, failing her so residing on the farm, she forfeited all right to possession of the farm. In the course of the proceedings the tenant was required to say whether she was or was not prepared to fulfil the condition of the lease, and, in answer, the tenant lodged a minute which was regarded by the Court as a refusal to comply with the condition of residence. The Court, in granting decree as concluded for, proceeded on the grounds—(1) that the conclusions of the summons were not in the nature of a declarator of irritancy in respect of a past contravention, but were entirely for the future and related solely to the effect of a refusal for the future to fulfil the condition, and (2) that the tenant had judicially declared that she would not fulfil the condition in future. In both these respects the present case is in marked contrast. The crave here is for declarator of irritancy in respect of a past act of contravention, viz.—the refusal of the defender in the letters of 2nd and 5th August, 1920—as these letters are construed by the pursuers—to supply milk after the end of August, 1920. Again in the present case the defender does not come into Court declaring that he will not implement this obligation in future. On the contrary, in his letter of 6th October, 1920—written before the action was brought—he intimated his willingness and intention to fulfil the condition, and on record (answer 3) he states that he "still offers to fulfil the condition." There is nothing to suggest that these declarations were, and are, not made by the defender in entire good faith. The position taken up by the pursuers in their letter of 9th October, 1920—written in reply to the defender's letter of 6th October—was that, owing to the defender's previous refusal to deliver milk, they had to contract elsewhere for the supply of milk; and, so far as appears, they adhere to that position. The defender cannot sell milk to the pursuers if the pursuers will not buy the milk from the defender. In short, taking the

action as a declarator of rescission or forfeiture as distinct from a declarator of irritancy, the situation is that the pursuers, at one and the same time, are seeking to have it declared that the defender's right of possession should be forfeited on the ground that he is failing to perform a condition of the lease and are themselves refusing to accept performance of the condition tendered by the defender without qualification.

I may add that, even if the contract were to be dealt with simply as a mutual contract between the parties and independently of the special considerations applicable in the case of a lease of agricultural land, I think that, applying the test laid down, for example, by Lord Dunedin in *Wade* v. *Waldon*, 1909, S.C. 571, and by Lord Blackburn in *Mersey Steel and Iron Company* v. *Naylor*, 1884, 9 A.C. 443, at p. 444, the obligation undertaken by the defender to supply milk is not a stipulation, the breach of which would entitle the pursuers to declare the whole contract at an end, but is merely a stipulation for the breach of which damages might be claimed. The contract imposes upon the defender a variety of obligations, divisible and differing in importance. This particular stipulation—though, no doubt, important from the pursuers' point of view—is not an obligation like the obligation of residence in *Edmond* v. *Reid* (cit. *sup.*), which the tenant alone could fulfil. The pursuers, in the event of the defender's failure or refusal to perform it, could, as they have done here, take measures to procure a supply of milk elsewhere, and could claim damages against the defender in respect of any loss sustained by them by reason of his failure to perform. Having regard, then, to the nature and terms of the contract as a whole and to the character of this particular stipulation, it cannot, I think, be affirmed that this particular stipulation is one which, in the words of Lord Dunedin in *Wade* v. *Waldon* (cit. *sup.*), "goes to the root of the contract," or which, in the language of Lord Blackburn in *Mersey Steel and Iron Company* v. *Naylor* (cit. *sup.*), "goes to the foundation of the whole contract."

On the whole case my conclusion is that the first plea in law for the defender falls to be sustained and the action is dismissed with expenses. J. M. I.

For pursuers—Mr. WILLIAM FYFE (Messrs. Fyfe & Murray), Greenock.

For defender—Mr. THOMAS HUNTER, Paisley.

SHERIFF COURT OF MIDLOTHIAN.

No. 62.
Midlothian
Smith v Commercial Bank of Scotland, Ltd.

Jane Miller Smith, *Pursuer;* Commercial Bank of Scotland, Limited, *Defenders.*

Company—Allotment letter—Exchange for scrip—Loss of allotment letter—Contract—Condition precedent—Guarantee.—Held that an allottee of shares in a limited company was not entitled to receive from the company delivery of certificate for the shares allotted except on production of the receipted half of the allotment letter, the allotment having been made on condition of such production and exchange. *Query* as to delivery of certificates on execution of obligation of guarantee and indemnity. Forms of such obligations.

The interlocutors in this case by the Sheriffs-Substitute (Guy and Neish), in which the contentions of parties are discussed and the facts stated, and by the Sheriff (Crole), were as under:—

August 5, 1920
Sheriff Guy

Edinburgh, 5*th August*, 1920.—The Sheriff-Substitute, having heard the agent for the pursuer and counsel for the defenders, and considered the cause, finds that it is admitted by the defenders that the pursuer is the owner of the shares referred to in the initial writ: Finds in law that the pursuer is entitled to the certificate of ownership of said shares without delivery to the defenders of the document (No. 10 of process) signed by the pursuer; repels the first plea in law for the defenders in so far as directed against the first conclusion of the crave of the writ, and also repels the second plea in law for the defenders; grants decree in terms of the first and second conclusions of the crave of the initial writ; finds it unnecessary to deal with the third conclusion of the crave of the writ and to that extent dismisses the action; finds the defenders liable to the pursuer in expenses, and remits to the Auditor of Court to tax the same and to report.

John C. Guy.

Note.—The pursuer applied for twenty B shares of £1 each in the defenders' company, and these shares were duly allotted to her. The allotment letter, having annexed thereto the acceptance of allotment to be signed by the pursuer, was sent to the pursuer, and she returned it to the defenders along with the £30 payable by her. The defenders' position is that they sent back the allotment letter with the receipt thereon for the £30, and that this allotment letter, if received by the pursuer, ought to have been retained by her to be exchanged for the share certificate. The pursuer says that she never received it and cannot, therefore, exchange it for the share certificate. The defenders admit that pursuer is the owner of the shares, and that she ought

to get the certificate in exchange for the allotment letter. But when she cannot produce the allotment letter it does not necessarily follow—in fact, the contrary is the result—that the defenders are entitled to have the document No. 10 of process signed by the pursuer and delivered to them. I do not know what claims may be made in respect of the missing allotment letter. No person other than the pursuer has any right in said allotment letter, and if any other person claims a right to the certificate of ownership of the shares from the defenders they can refuse to yield to any such claim, and the document that they asked the pursuer to sign will not add to or strengthen their position. They admit that the pursuer is the owner of the shares, and she is entitled to the certificate to that effect. She is receiving, or is to receive, the dividends on the shares, and the whole case turns upon whether she is to get now without any condition the certificate of ownership of the shares. I have repelled the first plea in law so far as directed against the declaratory conclusion of the initial writ. That was a necessary, though preliminary, declarator to the second crave of the writ, and I have given the pursuer decree under the first and second craves accordingly. I have found it unnecessary in the circumstances to give any effect to the third crave, and have dismissed the action so far as regards that crave. J. C. G.

The defenders appealed to the Sheriff. In the course of the appeal both parties were allowed to amend their pleadings, and thereupon the Sheriff recalled the interlocutor of the Sheriff-Substitute and remitted to him to hear parties of new, and to proceed as accords.

(This is the form of guarantee which the bank desired the pursuer to deliver to them.)

"I, Miss Jane Miller Smith, Belleville Cottage, Kilbarchan, Renfrewshire, considering that the Commercial Bank of Scotland, Limited, issued an allotment letter, No. 4253, dated the sixth day of October, Nineteen hundred and nineteen, for twenty of their "B" shares of one pound each, fully paid, in my name, bearing a receipt thereon for thirty pounds, being payment in full for the said shares at the rate of one pound ten shillings per share; and seeing that the said allotment letter has been lost, mislaid or accidentally destroyed, and cannot meantime be found, and that I have applied to the said bank to issue a certificate for the said shares without production of the said allotment letter, which they are agreeable to do on receiving the guarantee hereafter contained; therefore I, the said Miss Jane Miller Smith, do hereby undertake and oblige myself to free and relieve, and guarantee to keep harmless and skaithless, the said bank, of

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and from all loss, damage and expense they may sustain or incur in any way in consequence of issuing a certificate as aforesaid, as well as from all claims that may be made on the said bank at the instance of any one claiming, or pretending to claim, in respect of the said lost allotment letter: In witness whereof."

August 31, 1921

Sheriff Neish

Edinburgh, 31*st August*, 1921.—The Sheriff-Substitute, having heard the agent for the pursuer and counsel for the defenders, and considered the closed record, before answer, allows the parties a proof of their respective averments and to each a conjunct probation, the proof to proceed on a day to be afterwards fixed. E. W. Neish.

Note.—The record in this case discloses a sharp divergence between the parties as to the facts, and, in my opinion, it is necessary that the facts should be ascertained before the questions at issue can be dealt with satisfactorily. The pursuer has a plea to the effect that the defences are irrelevant. I do not think it necessary to deal with this plea at the present stage. In my opinion, the averments in defence are relevant to be remitted to probation whatever the ultimate result of their value as an answer to the pursuer's claim may be. I shall, therefore, allow a proof before answer.

E. W. N.

June 9, 1922

Sheriff Neish

Edinburgh, 9*th June*, 1922.—The Sheriff-Substitute, having heard the agent for the pursuer and counsel for the defenders, and considered the proof, productions, and whole cause, finds in fact (1) that in October, 1919, the defenders sent by post to the pursuer an allotment letter of which No. 12 of process is a copy; (2) that the pursuer returned by post to the defenders the lower half of the allotment letter, entitled "acceptance of allotment," which she detached from the allotment letter, and retained the upper half; (3) that thereafter the pursuer, at the request of the defenders, returned to them by post the upper half of the allotment letter; (4) that the defenders filled in the receipt for payment and posted the upper half of the allotment letter to the defender; (5) that the pursuer has not proved that she did not receive the upper half of said allotment letter; (6) that the pursuer has not returned the upper half of said allotment letter to the defenders; (7) that the defenders have registered the pursuer as proprietrix of the shares allotted to her in the bank's share register and have paid to her the dividends thereon; (8) that the defenders have refused to deliver to the pursuer the certificate for said shares except in exchange for the upper half of said allotment letter or upon the pursuer signing the guarantee (No. 10 of process): Finds in fact and

in law that it was a condition of the offer of allotment contained in said allotment letter that the upper half of said allotment letter should be carefully retained by the pursuer and exchanged for the share certificate: Finds in law (*a*) as regards the first and third craves of the initial writ that, as the defenders do not dispute the pursuer's ownership of the said shares or her right to the dividends thereon, the declarator and decree sought by the pursuer in these craves are unnecessary; and (*b*) as regards the second crave, that the defenders are not bound to deliver said share certificate to the pursuer except in exchange for the upper portion of said allotment letter or upon her executing the guarantee which the defenders have offered to accept; therefore dismisses the first and third craves of the initial writ, assoilzies the defenders from the second crave and decerns; finds the pursuer liable to the defenders in the expenses of process; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax under Scale II. and to report. E. W. NEISH.

Note.—On the facts in this case the dispute on record was concerned with the fate of the upper half of the allotment letter, and it appears to me that the proof, which has been led, is only relevant so far as it concerns that topic. The other questions debated by the witnesses for the pursuer appear to me to be questions of law.

I have tried to find the facts with regard to the upper half of the allotment letter as fully as possible. With regard to findings 1, 2, 3, 6, 7, and 8 there is no dispute.

As regards (4) the defenders have proved in detail the office method of dealing with correspondence, and the evidence of Burns appears to me to be convincing. He dealt with this particular allotment letter, and, just because it was the only case of the kind which passed through his hands, I think the accuracy of his recollection as to the action which he took may be relied upon. No doubt the entry in the postage book, "Smith, Renfrewshire," may be fastened upon as a weak spot in the evidence. Carmichael explains this abbreviated entry by saying that there was much correspondence at the time; but this was the only letter to "Smith, Renfrewshire," posted from the bank that day. Burns is quite clear that the letter was properly addressed, and I cannot conceive that Carmichael would have entered the letter in the postage book and put it into the bag for posting if the address had, in fact, been in the very truncated form given in the postage book.

Accordingly, it appears to me that the defenders have proved that the upper half of the allotment was posted back to the pursuer.

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The letter was not returned through the post office as insufficiently addressed. I think the defenders fulfilled their duty when they posted the letter. That was the method of transmission already selected by the parties.

As regards finding (5) the pursuer was not called as a witness, no doubt owing to her age and infirmity. I do not think the evidence of her brother can be accepted in substitution for her own evidence, and it therefore appears to me that this finding is justified upon the state of the proof.

The really difficult question in the case, I think, arises upon the marginal addition to the upper half of the allotment letter, and I think its effect is a mixed question of fact and law. The marginal addition is in these terms—"To be carefully retained, and exchanged for share certificate immediately after 31st December, 1919."

Form "A," although it is called an "allotment letter," is in terms, I think, an offer to allot certain shares subject to acceptance. It seems to me that the defenders were entitled to make the offer upon their own conditions, and the marginal addition, if it be a condition of the offer, is none the less effective because it is printed on the margin. It is, I think, just part of the written offer.

The marginal addition, which I have quoted, is perhaps not very precise in its terms, although I think it is the usual wording on such documents. Fairly read, however, it seems to me to prescribe as a condition of the allotment that the upper portion of form "A" must be retained and exchanged for the certificate. It is true that the lower half, "acceptance of allotment," which was signed by the pursuer does not refer in express terms to the marginal addition. Further, in answer 2, the defenders aver that "a person in possession of said upper portion would be in a position to call upon the defenders to give delivery of said share certificate, and the defenders might be put to much trouble and expense by such a claim." The defenders have not attempted to prove this averment, and their counsel, I think, declined to figure any definite case where liability might accrue to the bank. It may, however, be said that if the liability on the bank is negligible so also is the liability on the pursuer, if she signs the guarantee.

I think the case must be taken on the footing that the defenders in their offer prescribed a condition precedent to the delivery of the certificate and that the pursuer, having failed to fulfil that condition, cannot demand delivery of the certificate as of right. In my opinion that contention is sound in law, and the result is that I must assoilzie the defenders from the second crave of the initial writ. Looking to the attitude adopted by the defenders, the first and third craves are, I think, unnecessary and fall to be dismissed.

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It is right that I should add that the defenders have not adopted an entirely *non possumus* attitude. They have offered to deliver the certificate if the pursuer will execute the guarantee (No. 10 of process). I think the pursuer, in view of her failure to return the upper portion of the allotment letter, must accept the terms upon which the defenders are prepared to deliver the certificate. E. W. N.

The pursuer appealed to the Sheriff, and in the course of the proceedings the pursuer offered to grant to the defenders a document in the following terms. This the defenders accepted. A joint minute was thereupon lodged, in which the parties craved the Court to recall the interlocutor of the Sheriff-Substitute appealed against and to ordain the defenders to deliver to the pursuer the share certificate in question. The Sheriff, in his interlocutor, gave effect to this and dealt with the expenses of the action:—

(This is a copy of the document ultimately accepted by the bank.)

"July, 1922.

"Received by me, Miss Jane Miller Smith, residing at Belleville Cottage, Kilbarchan, Renfrewshire, from the Commercial Bank of Scotland, Limited, certificate of twenty "B" shares in my favour of the capital of the said Commercial Bank of Scotland, Limited, numbered in the said bank's share register 421, 450/421, 469, and in respect that the upper portion of a letter of allotment of the said shares sent to me by the said bank on or about 31st October, 1919, was never delivered to or received by me, and is not in my possession, although I have made a diligent search therefor, I hereby undertake that if the same should ever be discovered by me, to return it at once to the said bank; and I further undertake that the said portion of the said letter of allotment shall not be transferred or assigned by me to any person or dealt with by me in any way to the prejudice of the said bank. Signed by me on this third day of July, Nineteen hundred and twenty-two, before and in presence of, &c.

July 28, 1922

Sheriff CROLE

EDINBURGH, 28*th July*, 1922.—The Sheriff, having heard counsel for the parties, and having considered the joint minute for the parties lodged on 27th inst. (No. 24 of process), interpones authority thereto, and in respect thereof recalls the interlocutor of the Sheriff-Substitute appealed against, and ordains the defenders to deliver to the pursuer the share certificate mentioned in the (second) crave of the initial writ; finds the defenders liable to the pursuer in expenses (including those of this appeal), modified to one-half of the taxed

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amount; remits to the Auditor of Court to tax the same according to the lower scale in the table of fees, and to report; further sanctions the employment of counsel in the cause.

G. L. Crole.

For pursuer—Mr. J. Anderson Maclaren, advocate, instructed by Mr. A. W. Gordon, Edinburgh.
For defenders—Mr. W. H. Stevenson, advocate, instructed by Messrs. Bruce & Black, Edinburgh.

SHERIFF COURT OF LANARKSHIRE.

No. 63.
Lanarkshire
Robertson v Bessler, Waechter & Co., Ltd.

William Robertson, *Pursuer;* Bessler, Waechter & Co., Limited, *Defenders.*

Contract—Damages for breach—Defence of frustation of the venture repelled.—Held that whether a contract has been frustrated is in each case a question of circumstances. *Observations* as to doctrine of frustration.

Merchants chartered a ship for conveyance of nine consecutive cargoes of coke from a British port. One cargo only was carried. The shipowner sued for damages, laid at £14,000, for non-implement of the contract. The pursuer's first plea was, "The pursuer through defenders' breach of contract having sustained loss and damage to the amount sued for, decree should be granted therefor." The defenders' third plea was, "The contract having become frustrated, the defenders are entitled to absolvitor." In sustaining pursuer's plea the Sheriff-Substitute (Fyfe) pronounced the following interlocutor, which fully explains the circumstances:—

August 3, 1921
Sheriff Fyfe

Glasgow, 3*rd August*, 1921.—Having heard parties' procurators and considered the cause, finds (1) that pursuer is the owner of the s.s. "Agate"; (2) that defenders are merchants carrying on an extensive business as exporters of coke from, *inter alia*, the port of Newport; (3) that on 10th February, 1920, the defenders, by charter party (No. 7/1 of process), chartered the "Agate" from Newport to St. Malo, at a freight of 85s. per ton; (4) that the contract, in a controlling clause, provided—"This charter is for the conveyance of nine consecutive cargoes of coke as above, commencing, from, on, or about 3rd March, 1920, but should steamer be directed or requisitioned to load other cargoes owner to have the option of ceasing shipments until she can again be worked into position for loading the coke"; (5) that the steamer was not requisitioned by the Government; (6) that when the contract was made at 10th February coke was being shipped to France under permit of the Coal Controller, but there was then no serious difficulty in obtaining

permits; (7) that on 29th March, 1920, a Government notice, affecting, *inter alia*, the port of Newport, was given that export of coke was prohibited, unless under permit to be granted by the Controller, on the recommendation of the Port Supplies Committee; (8) that this notice was never formally withdrawn, but permits were more freely granted as time went on, and by September the notice had ceased to be a serious obstacle to export; (9) that, whilst the embargo notice was in force, considerable quantities of coke were shipped to France from Newport by defenders and other merchants; (10) that the "Agate" was only once stemmed under the charter, and carried one cargo to St. Malo, where it was discharged about 6th April, 1920; (11) that the pursuer was ready to send the ship to carry the other eight cargoes under the charter; (12) that the defenders did not again stem her under the charter, and in June, 1920, they definitely intimated that they declined to do so; (13) that these eight cargoes have not been carried: Finds in law that pursuer having been ready to implement his part of the contract, and defenders having declined to implement their part, defenders are in breach of the said contract of 10th February, 1920, and are liable to pursuer in damages; therefore sustains pursuer's first plea in law, reserving the question of assessment of damages; grants leave to appeal.

T. A. Fyfe.

Note.—1. There is no dispute in this case as regards the one shipment of coke which was made under the charter party of 10th February, 1920 (No. 7/1 of process). But, admittedly, only one of the nine cargoes were shipped. The other eight were not shipped, and the question involved is one of principle, and depends upon the construction to be put upon this clause written in at the end of the charter party—"This charter is for the conveyance of nine consecutive cargoes of coke as above, commencing from or about 3rd March, 1920, but should steamer be directed or requisitioned to load other cargoes, owner to have the option of ceasing shipments until she can again be worked into position for loading the coke." The latter part of this clause shows, I think, that it was in the contemplation of the contracting parties that the carrying of consecutive cargoes might be interrupted by Government action, and it is, I think, of importance that this as a possibility was contemplated at the time of the making of the contract.

2. I do not think that clause will reasonably bear the interpretation which the defenders try to put upon it. They ask me to read it as meaning briefly that, if any one of the nine contemplated shipments was prevented being shipped by the existence of a Government embargo upon the export

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of coke, that particular obligation to load *ipso facto* became cancelled. But there does not appear to me to be any contract stipulation to support this view, and there certainly is no express contract stipulation that an export embargo will cancel the contract.

3. A perusal of the correspondence suggests to me that the simple explanation of the situation is that in making their contracts (see list No. 15 of process) with the sellers of coke to them the defenders were not sufficiently careful to see that their colliery contract terms fitted in with the terms of the "Agate" charter. But the pursuer, of course, had nothing to do with that. He was entitled to get implement of his contract (No. 7/1), with which alone we are here concerned.

4. In their letter to Mr. Wilks (pursuer's agent) of 29th April, 1920 (letter 6 in No. 7/2 of process), the defenders quite frankly state their attitude when they say—"We fixed the 'Agate' to run voyages, because we had made contracts for coke, and had sold same to our friends in France. Owing to the embargo the collieries tell us that quantities not lifted in their regular monthly quantities will be cancelled; hence our reason for advising you that, in turn, we must cancel for voyages not carried out owing to the embargo." The pursuer at once repudiated this view (see letter No. 8 in 7/2), and he has throughout refused to recognise it, as a reasonable interpretation of the contract.

5. It appears that on 29th March, 1920, a notice was posted at Welsh ports to the effect that export in pursuance of pre-entries already endorsed would be permitted up to 3rd April, but after that export was prohibited, unless under special permit, to be granted by the Controller, on the recommendation of the local Supplies Committee (see text of order No. 22 of process and No. 25 of process, p. 5). The "pre-entry" referred to had been made an export condition by the Board of Trade general order (No. 24 of process).

6. It appears from the productions (17/1 to 17/16 of process) that defenders are large exporters of coke from Welsh ports, and that they were in the habit of selling to their buyers in France, upon contracts with shipment dates well ahead of the contract dates; and it appears from productions (16/1 to 16/30) that they bought coke from collieries also with delivery dates well ahead—sometimes for shipment by named vessels, but most commonly for delivery in about equal monthly quantities. It is obvious that this embargo on export might seriously dislocate defenders' contract arrangements; but, of course, that is not a circumstance of which I can take any account in this action. They

must be held to their contract obligations under No. 7/1 of process, unless they can, within the law, excuse themselves from performance.

7. The material obligations of the defenders under the contract (No. 7/1) were to load on each of the nine voyages a cargo of not less than 650 or more than 700 tons, and to pay freight at 85s. a ton. With the minor details we are not here concerned, for as regards the one voyage which was performed the charter stipulations were duly observed, and no question of demurrage arises. The present claim is not a claim for demurrage; but is a claim of damages for breach of contract, in respect of defenders' declinature to ship eight of the nine cargoes.

8. This was a contract to load a named ship nine times. In the ordinary case of a ship hired for a single voyage, of course, after the charterers have intimated that they want her stemmed, the ship must be tendered before the charterers' obligation to load her emerges. In a sense the "Agate" was not tendered at the loading port—that is to say, she was not sent eight times in succession to the named loading port, and there offered eight times to the charterers. But to have done so would have been absurd, in the face of the fact that the defenders took up the attitude that supervening circumstances had relieved them altogether of the obligation to load these eight cargoes. The defenders aver, no doubt, that the "Agate" was not tendered to them, but they do not state a plea in law upon that averment, and, in the circumstances, I do not think that any question arises upon tender of the ship. It is at any rate abundantly evident upon the correspondence that the pursuer all along was ready, and was anxious, to put in the "Agate" had defenders intimated that they had cargo for her.

9. An attempt has been made to show that the defenders offered to stem the "Agate" for a cargo in June. But that was not a *bona fide* offer to implement the contract. It was an offer to ship 600 tons only—the minimum contract quantity being 650 tons—and it was accompanied by a condition that the defenders should not be liable for dead freight. In other words, it was a proposal that the pursuers should lift a cargo under the contract, at a loss of £212 10s. Moreover, obviously insufficient time was allowed for the "Agate" to be offered; and that the defenders' proposal was not genuine is evident from the fact that, within a couple of days of offering to stem the "Agate" the defenders had chartered another vessel to carry this cargo, at a very considerably less rate of freight. This was an astute attempt on the part of the defenders to put themselves in the position of appearing to honour an obligation which they had already

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intimated they would not implement. I do not think that this proposal affects the present question. It was not an offer to implement the contract as expressed in No. 7/1 of process.

10. The only substantial plea stated for the defenders is that the contract was frustrated by a Government embargo upon the export of coke. In this connection the proof discloses the significant fact that from April, 1920, onwards the freight for coke to France steadily fell (see charter parties, Nos. 14/1 to 14/13 of process), which gives point to an observation made by Justice Rowlatt in one of the frustration cases, to the effect that in such cases one must be careful to see that the doctrine of frustration is not extended so as merely to let a party escape from a bad speculation, as this charter at 85s. turned out to be for the defenders, seeing that by May the market freight rate had dropped to 60s., and went on dropping, till by September it got to about 30s. (*Pacific Phosphate Company, Limited* v. *Empire Transport Company, Limited*, 36 T.L.R. 750).

11. The doctrine of frustration, I understand to be, speaking generally, that, if circumstances supervene after the date of a contract, which will prevent the contract being carried out, as in the reasonable contemplation of the contracting parties, then the contracting parties are free of their contract obligations. But many varieties of such circumstances may occur, and each case must be decided upon its own particular circumstances. The defenders found strongly upon the case of *Bank Line, Limited* v. *Arthur Capel & Co.*, 1919, A.C. 435, which definitely settled the point (about which there had been some doubt) that the doctrine of frustration may apply to a time charter, as well as to a voyage charter. There a vessel had been chartered for a year, but before she was delivered she was requisitioned by the Government. The Court held that, in the circumstances, the requisition and detention of the ship destroyed the identity of the charter service, and entitled the charterers to treat the charter party as at an end. But I do not think that the circumstances in the present case are at all the same as they were in the *Bank Line* case. One *Bank Line* circumstance which I think weighed considerably with the judges was that the owners sold the boat, inferring they they themselves regarded the time charter as having been frustrated. Special reference may be made to the judgment of Lord Sumner in the *Bank Line* case who reviewed the more or less conflicting authorities in regard to the meaning of frustration, and collected the various judicial attempts to define frustration, himself adopting a dictum of Lord Dunedin that " An interruption may be so long as to destroy the identity of the work or service, when resumed,

with the work or service when interrupted" (*Metropolitan Water Board* v. *Dick, Kerr & Co.*, 1918, A.C. 119—see Lord Dunedin at p. 128).

12. There is this one point of similarity between the *Bank Line* case and the present case, that the contract was a continuing contract. The present charter was expressed, no doubt, upon a printed form for a single voyage (the defenders' own printed form), but it was made a nine voyages charter by the last clause; and, as regards the principle of frustration, I do not think that there is any difference between a continuing contract of this sort and a clean time charter.

13. But the question in the present case does not arise, as it did in the *Bank Line* case, upon a requisition clause, although there is a requisition clause in the present contract also. The "Agate" was not requisitioned by the Government, and, even if she had been, that mere fact would not of itself have cancelled the charter. It would only have given the owners what is called "the option of ceasing shipments until she can again be worked into position for loading the coke." I do not think that article 2 of the war clauses attached to the charter No. 7/1 affects the present question. That article obviously applies to the case of an individual shipment, where a ship has been put in to load, but Government interference has in some way prevented that individual cargo coming forward for her. At any rate, under that article 2, as under the concluding clause of the charter itself, the option is with the shipowner alone; and the pursuer never exercised his option to cancel.

14. None of the cases referred to seem to me exactly in point. In the *Pacific Phosphate Company* case (*supra*) the contract was no doubt also a continuing contract, but the decision turned upon express contract provisions, and upon an exercised option. In 1913 shipowners had agreed to supply twelve steamers each year, from 1914 to 1918, to carry phosphate to European ports. There was a suspensive clause relating to possible outbreak of war "likely to affect the safety of the steamers or their cargoes." In that event either party had the option to suspend shipments till the termination of the war, "and the period of such suspension shall be added on to the end of the contract period.' In August, 1914, the shipowners declared the option. In June, 1919, they intimated that they regarded the adventure as frustrated. The Court held that the change of circumstances was so great that the doctrine of frustration applied.

15. In the case of the *Metropolitan Water Board* (*supra*) the contract was a building contract. A contractor had, in July, 1914, undertaken the construction of a reser-

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voir, to be completed in six years. In February, 1916, the Minister of Munitions, under his statutory powers, prohibited further work, and building work was stopped during the war. The Court held that the interruption created by this prohibition was of such a character and duration as to make the contract, if resumed, a different contract from that which had been interrupted, and so the contract had ceased to be operative.

16. An earlier case had dealt with the charter of a special type of vessel—a tank steamer—(*Tamplin S.S. Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited*, 1916, A.C. 397). That vessel had been hired on time charter for sixty months. At the outbreak of the war there was about three years still to run. The Admiralty requisitioned the steamer. It was held that this did not cancel the time charter. Lord Haldane (who dissented) thus defined the situation at common law—" When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing," and " that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved; the contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made." But, later in the judgment, he seems to concede that the effect of such a contingency arising may be that the contract is not destroyed, but only suspended, and he concludes—" The question must always turn mainly on the facts."

17. In all these cases the circumstances differed materially from those of the present case. So far as I know, there is no direct authority upon the effect upon a charter party of Government action which does not deprive anybody of his property, but merely temporarily restricts the volume of the export of a certain commodity. The nearest approach to it is the recent case of *M'Master & Co.* v. *Cox & Co.*, 1920, S.C. 566, and 1921, S.C. (H.L.), p. 24. That did concern an export prohibition order, and the decision seems to me to support the view that where (as here) there are no express contract stipulations as to the effect of an export prohibition order, a current contract is not cancelled merely because such an order has been made. The defenders here seem to me to be in a position analogous to that of the " buyer " referred to by the Lord Chancellor. The correspondence shows that the defenders want to get rid of their charter obligation to load these eight boats, to use the Lord Chancellor's words, " on the ground that a market which appeared to be open to them at the time the contract was made has since been denied to them by superior authority." The defenders'

case here is that the interruption of the carrying contract, owing to the embargo, denied to them their coke market. But that, owing to a change of circumstances, the carrying out of a contract may mean inconvenience or loss is no good reason for a contractor repudiating his contract obligations. There must be much more than that in the change of circumstances before a contract can reasonably be said to have been frustrated.

18. Keeping these general principles in view, one most important consideration is what was the state of knowledge of the contracting parties at 10th February, 1920, when this contract was made? The Defence of the Realm Regulations were then in operation, and the Board of Trade notice of 1st January, 1920 (No. 24 of process) had been issued. The embargo letter of 27th March (No. 22 of process) was not the introduction of a new principle. It was only a local application of an already existing situation as regards export. Merchants and shipowners both knew at 10th February, 1920, that Government interference with the normal execution of contracts was a possibility. Ships might be requisitioned, or an embargo might be placed upon export. As regards the contingency of requisition, which was a much stronger thing than an embargo on export, the parties did make a contract stipulation, and it is significant that this stipulation was, not that the contract should be cancelled, but only that in pursuer's option it should be suspended. As regards the contingency of embargo, they made no contract stipulation at all, from which circumstance I think it is a fair inference that what they contemplated in this event also was no more than that the operation of the contract might be suspended. If they had intended that an embargo on export should cancel the contract, wholly or partially, it was a simple thing to say so; but they did not.

19. That the defenders themselves did not originally entertain the view that the embargo cancelled the contract, and that the idea of pleading frustration was an afterthought, appears from their letter of 29th March, 1920 (letter No. 1 of 7/2 of process), in which they say, speaking of the embargo, "We shall not be able to lead this steamer further after the completion of her present cargo, *until such embargo is removed*." That some six weeks later this was still in defenders' mind appears from an expression in their letter of 7th May, 1920 (in No. 13/1 of process), to the secretary of the District Committee, where, speaking of the "Agate's" interrupted shipments, they say, "Of course, owing to the embargo, the voyages are *lying in abeyance* until such time as the export of coke is again granted." An obligation which is "in abeyance" can hardly be regarded as cancelled.

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20. It is significant also that, in making forward sale contracts with their buyers in France, as far back as November, 1919 (see 17/1 to 17/10 of process), the pursuers had inserted always a condition that the sale was subject to the necessary Government release of coke being obtained.

21. I think it is clear that, at the time the contract was made on 10th February, all that was in the contemplation of both the contracting parties was that owing to Government interference there might be some interruption of shipments of coke—or, in other words, the charterers might be prevented stemming the "Agate" for "consecutive" cargoes, in the chronological sense; but it was not in the contemplation of either party that the charter shipments, wholly or partially, should be thereby cancelled. It may perhaps be only a coincidence that the freight market had begun to fall before it occurred to the defenders that the very thing they had contemplated at 10th February, namely, restricted export facilities, might be regarded as cancellation of their contract obligation to load the "Agate" nine times. But it is a significant coincidence.

22. In the state of knowledge of parties at the date of the contract I do not think that the "Restraints of Princes" exception comes into the question at all, for a charter party exception does not refer to circumstances and conditions existent at the date of the charter, but only to circumstances which may afterwards emerge. Restriction of freedom of export was a principle already in operation at 10th February, 1920, and the posting of the notice at Welsh ports in March was not the imposition of a new condition in restraint of free trade, but only the local application of an already existing restraint. It was a matter of mere local administration, which in my opinion did not reasonably fall within the exception "Restraints of Princes." An embargo on export from particular ports is no more than a temporary restriction, which may be removed at any moment. Besides, this embargo never was an absolute restriction. Merchants continued to ship coke from Welsh ports to France after 3rd April, under permit, just as they had done before, the only difference was that the permit regulations were more stringent. The defenders themselves shipped 3562 tons (see No. 26 of process).

23. At any rate, charter exceptions cannot apply to voyages which were never made at all; and the doctrine of frustration is not based upon, or affected by, charter exceptions. The defenders' only case here is that they were relieved of their contract obligations in this commercial contract, because it was frustrated by the embargo notice of 29th March. They work the matter out in this fashion—Had the notice of 29th March not been posted the "Agate"

would have made, say, three voyages each month—that is to say, the nine voyages would have been completed by, say, the middle of June. But (except for the first cargo) they were not able between March and the middle of June to get permits to export any cargoes of the charter size (650-700 tons); and so, at all events, by the middle of June, the charter had been frustrated, and they were no longer bound to ship by the "Agate" at all.

24. I think this is a quite untenable proposition. In the first place, it reads into the charter party a time stipulation which is not there, it, in short, seeks to treat this voyage charter for nine voyages as if it had been a three months' time charter, which is a quite different kind of contract. There is no time stipulation in the charter as to the length of a voyage; and it will be observed that the "Agate" was not chartered to make nine consecutive voyages (the arrangements for a voyage being the shipowner's affair); but to carry nine consecutive cargoes (the provision of cargoes being the charterer's affair). Besides, even if the length of a voyage were a consideration affecting the present question—which I do not think it is—the proof does not support the proposition that the "Agate" would have made three voyages a month. The only criterion we have of what she might have done is the four voyages she did make—three under a previous similar charter (No. 7/3 of process) and one under the charter in the present case (No. 7/1). These voyages took various times, the average of the four being fourteen days, roughly, equivalent to two a month, on which basis, on the charterers' own theory, the contract would have run on to the middle of July.

25. But, in my view, this matter of the probable duration of a voyage does not come into the present question at all. It may perhaps have some bearing later upon the question of the assessment of damages; but that question I am not meantime dealing with. It has no bearing at all upon the question whether the contract was frustrated. Pursuers had contracted to carry nine times a minimum cargo of 650 tons; whether they took eight days, or fourteen days, or twenty days, to make a voyage was their affair. It was no concern of the charterers.

26. It is true, no doubt, that what the contract contemplated was the carrying of nine "consecutive" cargoes, but this contemplation was qualified, like all the other clauses in the charter, by the circumstances known to the contracting parties at the time the contract was made, one of which circumstances was that the cargo had to be released by the Coal Controller before it could be shipped. It was never contemplated that the "Agate," after she had completed one voyage, was to go back to Newport and lie up there for

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an indefinite time, in the hope that the Controller might release at least 650 tons of coke. The clause means no more than this, that for nine voyages the defenders had the "Agate" on call if and when they had cargo for her. "Consecutive" does not mean that unless, after completing one voyage, the "Agate" immediately entered upon a second, she had in the sense of the charter failed to carry consecutive cargoes, and so the charterers' obligation flew off. That would be an exceedingly convenient view for a charterer who is running a contract of this sort upon a falling freight market, for it would give the charterer the sole control as to whether or not he should fulfil his charter obligation to load. Whichever way one looks at the matter, it always comes back to the same thing, that the defenders want to read into this contract what is not there, namely, that if the charterers cannot provide any one of the nine cargoes, their obligation to ship that cargo is cancelled. I cannot accept that view.

27. It is trite contract law that both parties are bound or neither. Supposing the freight market had risen, instead of falling, could the pursuer have said to defenders, "You need not call for the 'Agate' any more, for we have decided not to send her to Newport, the contract having been frustrated"? I certainly think that they could not. No more could the defenders say that they would not load the boat.

28. What I have to do in this case, as the Court must necessarily do in every such case, is to look at the situation all round, in the light of its own circumstances, weighing up the probabilities, and giving consideration to all the elements which enter into the question of reasonableness, and to say whether the doctrine of frustration applied to this contract. After careful consideration of the whole circumstances, I come without hesitation to the conclusion that it did not; and that defenders are in breach of contract, and are liable in damages. Parties have agreed that the assessment of damages shall be reserved for future determination, after further proof if necessary. This not being in form, accordingly, a final interlocutor, I have granted leave to appeal. T. A. F.

The judgment was acquiesced in, and the damages afterwards assessed by private arrangement of parties.

For pursuer—Mr. H. B. Spens (Messrs. Maclay, Murray, & Spens), Glasgow.

For defenders—Mr. W. A. Allan (Messrs. Fyfe, MacLean, & Co.), Glasgow.

SHERIFF COURT OF MIDLOTHIAN.

No. 64.
MIDLOTHIAN
Malcolm v Trotter & Sons

WILLIAM TAYLOR MALCOLM, *Pursuer;* ROBERT TROTTER & SONS, *Defenders.*

Reparation—Negligence—Roadway—Invitation—Concealed danger.—Circumstances in which held that a tenant farmer who had contracted with a thrashing mill owner to do some thrashing at his farm was not entitled to recover from the latter the damage done by the mill engine to a weighbridge at the farm, which weighbridge was flush with the level of the roadway, and was indistinguishable from the rest of the roadway, and regarding which no notice had been given to the defenders' engine-driver, so that he might be on the lookout to avoid it while driving along the roadway.

The interlocutors of the Sheriff-Substitute (ORR) and the Sheriff (CROLE), which are given below, state the facts and also explain the respective arguments of the parties:—

Feb. 27, 1922
Sheriff ORR

EDINBURGH, 27*th February*, 1922.—The Sheriff-Substitute, having heard counsel for the parties and considered the cause, finds in fact (1) that in February, 1920, the defenders were employed by pursuer to do thrashing for him at his farm of Whittingehame Mains; (2) that on 4th February their thrashing mill and traction engine went for that purpose to pursuer's farm, arriving about nine o'clock at night; (3) that under directions of pursuer's grieve the mill was placed in a position in the stackyard convenient for thrashing on the following day; (4) that the engine was then moved to the water tank for water; (5) that the driver thereafter brought the engine to a position beside the mill on the south of it suitable and proper for driving it; (6) that to reach said position from the water tank the driver took the engine south along a metalled cart road on the west side of the farm steading, then traversed open ground in a north-west direction; (7) that in passing along said metalled cart road the engine drove over a weighbridge belonging to pursuer on the side of said road and partly projecting on to it, and damaged said weighbridge; (8) that said weighbridge was level with the road, that it had not been pointed out to the engine-driver, and its existence was unknown to him; (9) that it is not proved that any arrangement was made between pursuer's grieve and the engine-driver that the engine was to remain beside the water tank till the following morning; (10) that the route by which the engine was taken from the water tank to the mill was in the circumstances a natural and proper route: Finds in law that it is not proved that the damage done to pursuer's weighbridge by the traction engine was caused by the fault or negli-

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gence of defenders or their servant; therefore assoilzies defenders from the crave of the initial writ; finds the pursuer liable to the defenders in expenses, and remits to the Auditor of Court to tax the same, allowing fees to counsel, and to report. R. L. Orr.

Note.—The pursuer in this case is tenant of a farm in East Lothian; the defenders are owners of thrashing mills and engines who had a contract with pursuer to carry out some thrashing at his farm steading. For this purpose they sent a mill and traction engine, &c., to pursuer's farm on 4th February, 1920, in charge of some of their servants. The present claim is brought by the tenant against the owners of the thrashing mill and engine for damage which their servants caused while on his premises. The familiar case is that of a person entering the premises of another and being injured while in the premises; here it is the person who is on the premises by invitation of the occupier who is said to have committed a wrongful act for which he is liable in reparation. The action is expressly laid on fault or negligence on the part of defenders, and the question to be determined is—what fault or negligence has been brought home to the defenders?

The circumstances are briefly these. The mill and engine reached the farm towards nine o'clock at night. They entered from the public road on the south, being met at or near the entrance by the grieve whose duty it was to show defenders' servants where the mill and engine should be stationed alongside the stacks which were to be thrashed. A cart road, hard metalled, goes round the steading, which is practically square. The engine and mill were guided by the grieve westward along this south road of the steading. The stackyard lies at the west side of the steading, and the stacks to be thrashed were a considerable distance northwards from the south road which the mill and engine traversed when they entered the farm. When they reached the south-west part of the steading the grieve pointed out to the driver the position of the stacks he had to deal with, and the driver proceeded to place his mill into position beside them, crossing for that purpose the open soft ground of the stackyard diagonally in a north-westerly direction. The mill was stationed where it is shown in the plan No. 17, and the engine which had drawn it was then to the north of the mill. The next thing that was done was to take the engine across to the water tank shown on the plan. For this purpose it was moved across the open ground to the north of the three stacks indicated on the plan. The grieve and the other farm hands left while the engine was at the tank, and when the boiler was filled the driver proceeded to

take his engine back to the mill, intending to place it in such a position to the south of the mill that everything would be ready to start work on the following morning. He did not return by the way he came, because it was necessary for the purpose of the thrashing that the engine should be stationed south of the mill, as shown in the plan. It had accordingly to cross more or less of the open, soft ground of the stackyard to the south of the position where the mill stood. The driver thought the best plan was first to go down the metalled road, coloured brown on the plan, to its junction with the south road by which he had entered, and then turn and proceed north-west over the open ground he had already traversed and was familiar with, until he reached his proper place just south of the mill. But in going down the road from the tank his engine went across a weigh-bridge (shown on the plan) which projected some distance on to it. He had not been told about the weighbridge, and there was nothing to indicate that such a thing was there. Owing to the weight of the traction engine (it was 12 tons), the weighbridge was broken in parts and badly damaged. The driver continued south and then turned northwards over his former route up to the mill.

Pursuer's case is that defenders' servants were in fault in using the road where the weighbridge was. The first point urged against defenders is that an arrangement was made between the grieve and the engine-driver that the engine was to remain beside the water tank till next morning; it was only after this arrangement was made that the grieve retired. The alleged arrangement was between Webster, the grieve, and Ainslie, the driver, only; no third person heard what was said, if anything was said. Webster says, "I had a conversation with the engine-driver when he had his engine stopped near the water tank. He said he would let the engine stand there all night until morning, and that he would place it in the morning. That was the conclusion we came to, and I went off and left him there. . . . I said it was all right; I would be up in the morning and give him a hand to place it." This was, according to the grieve, about nine o'clock. Ainslie, the driver, denies altogether that anything to this effect was said. I confess I think it unlikely that the driver should have said what Webster reports. The proposal, as he puts it, came from Ainslie, not from the grieve. Now, there is abundant evidence to show that the ordinary practice of defenders' servants was to get the mill, engine, &c., all placed in proper position the night before commencing work. Ainslie says, "I always shift my engine at night as near position as possible." Darrie, another of defenders' men—"What

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is the practice about placing the engine and the mill at night? —*A*. Well, at night we generally get it as near ready as possible for next morning." And it is proved that this is —as one would expect—the general practice. Webster, the grieve, says, "If it is possible, it is the usual thing for the engine and mill to be placed in position the night before, in order that operations may start at daylight next morning." Downie, another of pursuer's men, "I knew that the usual thing is for the engine to take up position at its proper place for operating the mill next day." Mr. Campbell, a man of wide experience and a pursuer's witness, says, "I should say that in nine out of ten cases the usual thing was to place the engine in position to operate the mill, the night before." To the same effect says Mr. Crichton, a witness for the defence, who has been a farmer all his life, and has constantly used travelling thrashing mills—"The general practice as to placing an engine in position for thrashing purposes is to do it as soon as possible when they get into the place. It is usually done the night the engine arrives. *Q*. Why is that? *A*. To be ready to start on the following day. That would be particularly so in February when the days are short." That being the practice, I think there is force in Ainslie's reply when he says, "If he had told me to stay there I would have asked the reason, because I always put my engine as near in position as possible." In point of fact there was no reason for not finishing the job that night. It was only nine o'clock, according to the grieve, or 9.30 according to Ainslie. The work, if not done then, would have to be done in the darkness next morning. I am disposed, therefore, on these grounds to believe Ainslie. But in any event, the alleged arrangement is not proved; there is one witness against another, and I observed nothing about Ainslie to lead me to reject his evidence in favour of Webster. It almost appears as if the so-called arrangement was an afterthought. The occurrence happened on 4th February, 1920. In March, 1920, pursuer was threatening legal proceedings. In a letter of 12th March he tabled the ground of his complaint, and there was no hint of it then. The negligence of defenders' servants was this—"It was a bright moonlight night when the thrashing machine arrived, and the driver was either blind or utterly regardless to drive the engine close to the wall of the farm buildings and smash the machine." Even a year later, when the action was served in February, 1921, neither pursuer nor his agents had heard of this alleged arrangement. There was no hint of it in the pleadings with which pursuer came into Court. It appears first in the adjustments put on at the closing of the record.

Apart from this ground of action, pursuer's case is that defenders' servants were negligent in using the road to get their engine back to the mill without intimation to and express consent given by pursuer's servants, or without previous examination of the road to see that it was safe. Now, it was impossible to avoid taking the engine down the road for some distance. It might then have been turned to the right on to the soft ground of the farmyard, and across it until the engine had made a complete turn and was brought up facing the mill to the north of it. The other way, which was actually followed, was to go south along the whole length of the road, make the turn to the right there, enter the soft ground, and proceed across it north-west up to the mill, over the same route as the engine had travelled shortly before. The reason why the driver chose the latter plan was that the open ground was soft and wet and he had found some difficulty in getting his heavy engine across it; stones had been put down to make this easier, and he wished to take advantage of this and cross where there was least difficulty. Young Mr. Malcolm, pursuer's son, says, "In crossing the stackyard we had a slight difficulty. . . . What was the difficulty caused by? *A*. The wheels of the engine were skidding round. *Q*. The ground was soft and wet, and the wheels of the engine were skidding, and it could not make any progress? *A*. Yes." Ainslie, the driver, adds, "The grieve and some men with him gathered stones to get us up there with the engine. . . . Having filled my tank, I just took up my engine along the road to put the mill in position as near as I could for the morning. I kept on the road and went south, up the same way as I went before as near as possible. I did that because it was the best means to get round about to the other end of the mill. . . . That was the best means. We had put stones on the road we went up before. I would have had to carry up stones again. *Q*. That would prevent your engine from skidding? *A*. Tried to keep on the same track on the stones. It did not take us more than a quarter of an hour to shift the engine from the water tank into position." It appears to me impossible to affirm that the driver was guilty of any negligence in taking this route in the circumstances in which he found himself. Mr. Campbell, the pursuer's witness, to whom I have already referred, expressly admits that to do as the driver did that night "was not an unnatural thing."

The only remaining point, then, is, having decided to take his engine down the road, was it the driver's duty first to inspect every yard of the road with a lamp, or to have a man with a lamp going in front of the engine? He knew

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that this was a hard, well-made cart road; he had already traversed the southern part of it. It was, in fact, "a full cart road, hard metalled" (pursuer), "a bottomed road made with stones; it is a hard road right round the steading" (Webster). The farm people had gone away for the night, and no warning had been given him of any danger on this apparently safe and strong road. I think that the driver, who was in the farm on pursuer's invitation, and was doing what was usual and proper in taking his engine back to the mill, was, in the absence of knowledge or warning of danger, entitled to take for granted that this road was safe for him to traverse and that he was entitled so to use it. It is admitted there was nothing to distinguish the weighbridge, which was flush with the level of the roadway, from the rest of the road, nothing to attract the driver's attention in any way to it. The pursuer or his servants were bound, in my opinion, to have it in view that the driver might take his engine back along this road, and they had a duty to give him some warning of what was to him a hidden danger on the road. If Ainslie is to be believed, the grieve made a significant remark to him next morning. "I told him that the engine had gone down into the weighbridge and had broken the weighbridge. He said he was sorry he had not told me the night before about the weighbridge being there." The grieve denies this, but I confess I think it highly probable that such an observation fell from his lips at that moment.

Several authorities were cited at the hearing; the conclusion which I have reached seems to me to give effect to the principles which have been recognised as applicable in this branch of the law. R. L. O.

May 25, 1922
Sheriff Crole

Edinburgh, 25*th May*, 1922.—The Sheriff, having heard counsel for the parties on the pursuer's appeal, and having considered the cause, adheres to the interlocutor of the Sheriff-Substitute of 27th February, 1922, appealed against, and dismisses the appeal; finds the pursuer liable to the defenders in the expenses of the appeal, and remits to the Auditor of Court to tax the same (allowing fees to counsel) and to report, and remits the cause to the Sheriff-Substitute. G. L. Crole.

Note.—This is an action by a farmer against a firm of thrashing and baling contractors for the damage caused to a weighbridge by the fault of the defenders' servants. On the night of 4th February, 1920, the defenders, who had contracted to thrash a certain part of the pursuer's crop on the following morning, sent a mill drawn by a traction engine to the pursuer's farm of Whittinghame Mains, East Lothian.

The movements of the mill and engine at the farm, and the facts of the case generally, are fully set forth by the Sheriff-Substitute in his note, and I therefore think it unnecessary to resume them.

The engine-driver, after placing the mill near the stacks that were to be thrashed, detached his engine from the mill, and, guided by the pursuer's grieve, Webster, proceeded to a water tank on the farm to fill the boiler of his engine. The pursuer's case in the first place is that an arrangement was come to between Webster and Ainslie, the driver of the engine, that the engine was to remain all night at the water tank and the next morning was to be moved back to the mill with the help of Webster, and placed in position; that in consequence of this arrangement Webster left the engine-driver at the tank, but that the engine-driver, notwithstanding this arrangement, moved his engine down the farm road running north and south, and damaged the weighbridge, and that he was in fault in so doing. I think if this arrangement had been proved, the pursuer's case would have been a formidable one; but I agree with the Sheriff-Substitute that it is not proved. Webster says that it was Ainslie who proposed that the engine should remain at the tank all night, and that he agreed, and said he would "give him a hand to place it" in the morning. Ainslie gives a complete denial to this. No third party was present. It is said that Webster is corroborated by the pursuer's son, George Malcolm, who says that when the engine was standing at the tank Webster told him that "they were going to leave the engine there till morning," but he does not say that Webster told him that an arrangement had been come to with the engine-driver. Webster is not asked if he made this remark to George Malcolm. Webster says he told the pursuer next morning about the arrangement, but the pursuer is not asked if Webster told him this. In his letter of 13th March, 1920 (No. 11 of process), the pursuer, in intimating his claim, makes no mention of any arrangement, and bases his claim on other grounds. The attitude of Webster the following morning is significant, and, I think, inconsistent with any such arrangement having been come to. He found the engine away from the tank and already placed at the mill. When he saw the engine-driver he said nothing to him about the arrangement, and did not ask him why he had moved his engine. When Ainslie told him he had damaged the weighbridge he, according to Ainslie and Barrie, said that he was sorry he had not informed Ainslie the night before that the weighbridge was there. Webster denies this, but I think it is proved. I think the truth of the matter is that Webster left the driver of the engine at the tank that night, not because of any arrangement, but because

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he considered that the engine-driver could find his way back to the mill without his assistance, and, it being past nine o'clock at night, he was anxious to go home. He was asked if the engine-driver gave any reason for leaving his engine at the tank all night, and he says, "Well, it was about bedtime for one thing. It was about nine o'clock. . . . I thought it was a better plan to leave it where it was, and we would put it right in the morning, because we had been long enough there."

The pursuer further argued that, assuming the above arrangement is not proved, still the driver of the engine was in fault in using the road in question to get his engine back to the mill, as it was not a reasonable route to take, and the driver did not know the road. He should either have got the consent of the pursuer to use the road or have surveyed it before using it. I think two points are clearly proved, first, that the usual course to pursue when thrashing is to take place the next morning is for the driver to place his engine in alignment with the mill the night before, and that this practice was well known to Webster, the grieve; and, second, that the route the driver took on this occasion was, in the circumstances, a natural one to take. He might have proceeded for a short distance down the road in question and then straight across the stackyard to the mill, but in that case he would have had to manœuvre his engine on the soft ground of the stackyard, which he knew was a somewhat difficult operation. For this reason he preferred to go down the road and up the route through the stackyard, which he had previously followed and on which stones had been placed. In this way he got his engine in a line with the mill without manœuvring it in the stackyard. That Webster, the grieve, thought the driver was likely to take this route is, I think, shown by the remark above referred to which he made to Ainslie when told by him the weighbridge had been damaged.

The driver was in the pursuer's premises on the pursuer's invitation. He was performing a usual operation on the night in question in taking his engine back to the mill, and he went by a route which in the circumstances was a natural one. I cannot say that his actings were unreasonable. I agree with the Sheriff-Substitute that he was entitled to assume that the road was safe, and that he was not in fault in using it. It is not said that he drove down the road in a reckless manner. The weighbridge was flush with the road, and it was not possible for him to distinguish it from the rest of the roadway. The weighbridge, in my opinion, formed an unusual and hidden danger, and I think it was the duty of Webster to have warned the driver of its existence and the necessity of avoiding it.

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The case is an unusual one, but I think it is ruled by the principle laid down in that class of case of which *Indermaur* v. *Dames*, 1866, L.R. 2 C.P. 311, is an example.

G. L. C.

For pursuer—Mr. D. A. GUILD, advocate, instructed by Messrs. Guild & Guild, Edinburgh.
For defenders—Mr. A. R. BROWN, advocate, instructed by Mr. W. Marshall Henderson, Edinburgh.

SHERIFF COURT OF LANARKSHIRE.

No. 65.

LANARKSHIRE
Portpatrick and Wigtownshire Joint Railway Committee *v* Brown

PORTPATRICK AND WIGTOWNSHIRE JOINT RAILWAY COMMITTEE, *Pursuers;* DONALD BROWN, *Defender.*

Contract — Railway ticket conditions — Breaking journey—"Day of issue."—Held a good contract condition that the outward half of a return ticket which permitted break of journey at specified stations could be used only on its "day of issue," and that the holder who had broken journey from off the last train on that day, and who on resuming his journey by the first available train next morning tendered the ticket, was bound again to pay the fare for the part of his journey not travelled on the previous day.

The circumstances in which the question arose are fully explained in the following written judgment issued in the Glasgow Small Debt Court by the Sheriff-Substitute (FYFE):—

June 26, 1922
Sheriff FYFE

GLASGOW, *26th June*, 1922.—Having considered the proof and heard parties' procurators, decerns for payment as craved with £1 10s. 5d. of expenses. T. A. FYFE.

Note.—The pecuniary interest in this case is small, but the case has been keenly fought, because the principle involved is of importance. The sum sued for is 10s. 1½d., being 3s. 4½d. the fare from Newton-Stewart to Stranraer on three occasions—13th December, 1921; 7th February, 1922; and 7th March, 1922—on which dates defender is alleged to have travelled from Newton-Stewart to Stranraer "without being in possession of a ticket valid for the journey and without having paid his fare." Admittedly defender travelled on the dates mentioned. Admittedly also he refused to pay the 3s. 4½d. demanded of him on each occasion, his contention being that he did have, and tendered at Castle-Kennedy (where the tickets for Stranraer are collected) on each occasion what he regarded as "a ticket valid for the journey," although it bore the date of the day previous to that on which he was travelling.

What the defender tendered was the outward half of a

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return ticket from "Glasgow St. Enoch to Stranraer P.P & W. Jt. *via* Barrhead and C.-Douglas." That ticket bears on the face of it "See conditions on back," and on the back is printed "This through ticket is issued by the Glasgow & South-Western Railway Company subject to the conditions and regulations referred to in the time tables, bills and notices of the respective companies or owners on whose railways, coaches or steamboats it is available." Of this through journey, the portion between Newton-Stewart and Stranraer is on pursuers' railway.

In the time-tables and posters issued for the information of the public, and which were known to the defender, there is this notice given to passengers, "Single journey tickets and outward halves of ordinary return tickets will be available on day of issue only."

There are two ways of travelling by rail from St. Enoch to Stranraer. A passenger can elect to travel direct to Stranraer, in which case he gets a ticket from St. Enoch to Stranraer *via* Girvan, for which he pays 18s. 4½d.; or he can elect to travel by the longer route *via* Dumfries, in which case he gets the ticket which pursuer had—from St. Enoch to Stranraer *via* Barrhead and Castle-Douglas—for which he pays 24s. 11½d. Going by this route, although it costs him 6s. 7d. more, the passenger has the privilege of breaking his journey at what are called "open stations," two of which are Dumfries and Newton-Stewart. The defender, who does business in these towns, appears to have been in the habit, when he went to Stranraer, of travelling by the longer route, and breaking his journey at Dumfries and at Newton-Stewart. On the occasions in question, he left Glasgow in the morning and broke his journey at Dumfries. Later in the day he travelled from Dumfries, in a train which went to Stranraer, but he left it at Newton-Stewart, in the knowledge that there was no later train that day to take him on to Stranraer. He remained overnight at Newton-Stewart, and went on next day by a forenoon train to Stranraer. At Castle-Kennedy, where Stranraer tickets are collected, he tendered the outward half of his Stranraer return ticket. Observing the date stamped on it to be the previous day, the ticket-collector refused to accept it, on the ground that it was not valid beyond the day of issue. Defender declined to pay, and what he is now being sued for is the fares for the three journeys from Newton-Stewart to Stranraer.

What defender here attempts to do is to convert a privilege incidental to a contract into a contract obligation. But the granting of a privilege does not create an obligation in law. The ancillary privilege to break the journey at New-

ton-Stewart must be taken within the contract itself, and the only contract right conferred by the ticket was that, on the day of issue, the defender might travel through to Stranraer, but on that day only. He might, on that day, make his journey in instalments, if he could, but he could not convert the contract into one entitling him to travel the last stage of his journey on the day after the day of issue of the ticket. He was in a train on the 12th December which, had he remained in it, would have carried him to Stranraer on 12th December, the day of issue of the ticket. He knew that to be the last train by which, on 12th December, he could go on to Stranraer, and, in that knowledge, he elected to leave the train at Newton-Stewart. He thereby elected to determine the only contract represented by the outward half of his return ticket (*Ashton* v. *L. & Y. Railway*, 1904, 2 K.B. 313; *Bastaple* v. *Metcalfe*, 1906, 2 K.B. 288), and on 13th December he was attempting to travel by a ticket which was not valid on 13th December. He was therefore bound to pay the fare demanded on 13th December from Newton-Stewart to Stranraer. On the two subsequent occasions the circumstances were similar. The defender is therefore liable to pursuers for payment of the three fares sued for. T. A. F.

For pursuers—Mr. A. Macphail, Glasgow.
For defender—Mr. Donald MacKay, Glasgow.

SHERIFF COURT OF ROSS-SHIRE.

James Crockett, *Pursuer;* The Stornoway Pier and Harbour Commission, *Defenders.*

Negligence—Ship breaking loose from moorings—Responsibility of harbour authority—Sunken wreck in harbour.—Circumstances in which *held* that Harbour Commissioners were not liable for damage done to a boat which had been berthed in their harbour and which during a storm had broken from her moorings and been driven on to sunken and partially submerged wreck in the harbour. The master of the boat having selected the berth and the adjacent wreck being then visible he took the risk of possible damage from such wreck in the event of his boat breaking adrift.

In this action James Crockett, fisherman, Stornoway, sued the Stornoway Pier and Harbour Commission for payment of £450 as loss and damage sustained by him under circumstances which are described in the interlocutor of the Sheriff-Substitute (Haldane). He pleaded (1) the pursuer having suffered loss and damage to the extent sued for, through the fault of the

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defenders or of those for whom they are responsible, is entitled to decree as craved. The defenders pleaded, *inter alia*, (1) the pursuer's averments being irrelevant, the action ought to be dismissed. (3) The pursuer having suffered no loss and damage through the fault of the defenders, or of those for whom they are responsible, the defenders are entitled to be assoilzied. (4) The loss and damage complained of being due to a *damnum fatale*, the defenders are not responsible therefor.

The Sheriff-Substitute found that the defenders were not liable in damages to the pursuer, and on appeal the Sheriff (Mackintosh) in effect adhered to the Substitute's judgment. The interlocutors in the case were as follows:—

Nov. 21, 1921

Sheriff Haldane

Stornoway, 21*st November*, 1921.—The Sheriff-Substitute, having resumed consideration of the cause, sustains the third plea stated for the defenders; assoilzies them from the conclusions of the action, and decerns; finds the pursuer liable to them in expenses; allows an account thereof to be given in; and remits the same when lodged to the Auditor to tax and to report. J. R. Haldane.

Note.—In this case the pursuer, who is owner of a motor fishing boat, sues the Stornoway Pier and Harbour Commission for damages in respect of injuries sustained by his boat while berthed in Stornoway Harbour in the course of a gale during the daytime on 16th March last. I think his pleadings, even as now amended, do not give sufficient notice to the defenders of the precise grounds on which he proposes to prove a case of liability on their part. I do not find it necessary, however, to adopt the undesirable course of deciding the case on this purely technical point, because I think his case is fundamentally irrelevant. Even if he were allowed the widest latitude and proved all the facts which he has indicated on record he would not be entitled to a decree against the defenders, because his own averments contain admissions sufficient to negative any liability of the defenders. "The irrelevancy is not in the mere statement of the case but in the claim itself. I am therefore for assoilzieing the defenders." (The Lord President in *Feeney* v. *Dechmont Colliery Co.*, 1896, 4 S.L.T. 210.) Accordingly I have assoilzied the defenders instead of merely dismissing the action.

The pursuer's case is founded on the alleged fault or negligence of the defenders. The injuries which his boat suffered were caused by other boats in the harbour being broken adrift from their moorings during the gale and

driven on to the pursuer's boat, breaking her in turn adrift from her moorings at her berth. The presence in the neighbouring berth of some sunken and partially submerged fishing boats, which had been there for some time deprived the pursuer of sufficient manœuvring space to get away from that part of the harbour. Meanwhile another boat broke adrift and bore down on still another boat breaking her adrift also. This latter boat, a smack, in turn bore down on pursuer's boat, which was apparently thus still further penned in, and unable to escape, was driven on to the sunken boats and received such injuries that she sank. The pursuer attributes the damage sustained by his own boat (first) to the presence of the sunken boats depriving him of sufficient space to manœuvre his boat out of the danger zone; and (second) to the submerged condition of these boats causing the impact of his own boat against them to be received on a more vulnerable part of his boat than would have been the case if his boat had collided with other floating craft or with some other object. The fault which he attributes to the defenders is their failure to have these sunken boats removed.

I think I can best state the law in regard to the duty of harbour authorities in reference to the removal of wrecks by quoting the words of Lord Blackburn in the recent case of *Ellerman Lines* v. *Dundee Harbour Trustees*, 1921, S.C. 169, at p. 183—"I do not think it is doubtful that it is the duty of the defenders to keep the approaches to the harbour safe, and that the most effective way in which they could have done so would have been by removing the wreck. It was in close proximity to the fairway, and its size constituted it a serious danger to navigation. They have power to remove wrecks in terms of the Harbour Act, 1847, sec. 56, and the Merchant Shipping Act, 1894, secs. 530-534, and also power to light and buoy a wreck until the raising, removal or destruction thereof, sec. 530 (*b*). These powers are expressed permissively but there can be no doubt that they import a duty, although there is no compulsion on a harbour authority to adopt the one method of protecting navigation rather than the other. *If a wreck is so marked so as to provide an unmistakable warning to mariners, then in my opinion that would be sufficient to protect the authority from liability.*" (The italics are mine.) It is to be noted in passing that although Lord Blackburn's decision in that case was overturned by the First Division it was purely on the facts and no exception was taken to his statement of the law (see per Lord President Clyde at p. 195). Now, the accident here occurred in broad daylight, the sunken boats were only partially submerged,

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and there is no suggestion that their presence and position were not patent to all mariners using the harbour, or that the full extent of the danger was unknown to the pursuer. The pursuer alleges, indeed, that he himself had directed the attention of the harbourmaster to the danger which he considered these boats constituted. The accident is no way attributed by him to lack of warning of the danger, and so nothing remained to be done by the defenders in that respect to protect themselves from liability for this accident. The pursuer founds his case on the mere presence of the danger, such as it was. Now, no doubt, in certain circumstances as indicated by Lord Moncrieff in the case of *Parker* v. *North British Railway*, 1898, 25 R. 1059, at p. 1070, lack of sufficient manœuvring space for which the harbour authority is responsible might conceivably involve them in liability for damages, as, for instance, if a ship were trapped into a position of unforeseen danger in consequence; but the circumstances here fall very far short of any case of that sort. The sunken boats had originally been berthed in a tier in the inner harbour, in the usual way, and had sunk in the berth in that position. The space available at the adjacent berth may in consequence have been slightly restricted owing to the greater necessity of keeping clear of them than of floating boats, but that was a matter which the master of any boat proposing to occupy the adjacent berth had the same means of judging as the harbour authorities. It is for the master of a ship to decide whether the berthing accommodation offered or available in a harbour is of sufficient size for the safe berthing of his ship. The means of judging of this are peculiarly within his own knowledge, depending upon the dimensions and navigating peculiarities of his own ship; and harbour authorities have neither the same means of judging, nor do they undertake any responsibility, in the matter. The pursuer in this case does not even aver that the berth was assigned to him by the harbour authorities. He appears to have himself selected the berth adjacent to the sunken boat without the harbour authority taking any part in the matter. He had, moreover, occupied the berth for some time before the accident happened and had thus the fullest opportunity of gauging the extent of the danger, and by remaining there he had accepted the risk, such as it was. It is to be noted, however, in passing, that on the pursuer's pleadings the restriction of manœuvring space does not even appear to have been due entirely to the presence of the sunken boats but was also contributed to by the breaking adrift of one of the other boats, the smack, by no alleged fault of the harbour authorities.

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Sheriff HALDANE

As regards any danger which arose out of the mere presence of the partly submerged boats in the neighbourhood owing to the greater liability to damage from impact with them than from impact with floating craft or the other objects usually encountered in a harbour, as distinct from the question of manœuvring space, the same considerations apply; but there is in addition this further consideration. In the frequently quoted words of Lord President Inglis in the case of *Thomson* v. *Greenock Harbour Trustees*, 1876, 3 R. 1194, at p. 1200, the obligation of harbour authorities "is not an obligation to insure against accident, but only an obligation to use reasonable diligence to prevent the occurrence of injury to vessels." The defenders were, in the view I have taken, as indicated above, under no obligation, in the daytime, at any rate, to protect from this danger a ship under navigation or control by its own master, as all ships using the harbour are expected to be, and I cannot conceive that there could reasonably be any obligation on them to take steps to prevent injury from it to a ship adrift or out of control.

These considerations are sufficient in my opinion for the decision of the case; but there is another consideration which I think is equally fatal to the pursuer's claim. I can only consider the facts and circumstances which are actually alleged to have arisen in the present case. I cannot consider general and partly hypothetical questions of what might have been the liabilities of the harbour authorities for injuries caused to a ship by colliding with these sunken vessels through a different accident, under different circumstances. To mention one reason only the defenders might have taken effectual means to prevent the injury if the accident had happened in a different way and under different circumstances. And, apart from any of the questions of *vis major* or *damnum fatale* raised by the defence, it is obvious from the pursuer's own averments that the injuries to his boat were the result of such an extraordinary concatenation of accidents as no harbour authority would reasonably be expected to anticipate. J. R. H.

Feb. 14, 1922

Sheriff MACKINTOSH

EDINBURGH, *14th February*, 1922.—The Sheriff, having considered the reclaiming petition and answers and the whole process, alters the interlocutor of the Sheriff-Substitute of 21st November, 1921, by deleting therefrom the words, "sustains the third plea stated for the defenders, assoilzies them from the conclusions of the action," and substituting in their place the following words:—"Finds that the averments of the pursuer are irrelevant; dismisses the action," with that alteration adheres to the said interlocutor, and refuses the appeal; finds the pursuer liable to the defenders

Ross-shire

Crockett *v* Stornoway Pier and Harbour Commission

Feb. 14, 1922

Sheriff Mackintosh

in two-thirds of their expenses of the appeal; and remits the case to the Sheriff-Substitute. J. Mackintosh.

Note.—I do not think the condescendence sets forth a case relevant to go to proof. In the absence of an averment that the harbourmaster was responsible in some way for the pursuer's boat being berthed where it was, and that the pursuer paid dues for the accommodation, it is difficult to discover the elements of a relation between the parties which would cast on the defenders a duty of taking care for the safety of the boat. But, apart from this initial defect, I find no sufficient statement of what the duty owed to the pursuer was or of negligent failure by the defenders to perform such duty. The pursuer ascribes the loss of his boat to the presence in the adjoining berth of three large fishing boats which some time previously had fouled each other, sank, and lay embedded in the mud. He describes them as wrecks partially submerged at high water, and avers that they constituted a serious danger to all fishing craft cruising round that part of the harbour, and he implies that it was the duty of the defenders to remove them. The alleged danger to cruising craft does not seem to apply to his boat, which was then laid up third from the quay, made fast to a trading smack and to the quay. There is no statement whether the alleged duty is statutory or not, but at the discussion on the preliminary plea the 56th section of the Harbours Act, 1847, and the supplementary sections of the Merchant Shipping Act, 1894, seem to have been founded on. The Sheriff-Substitute, proceeding on a recent authoritative exposition of the statutory duties of harbour authorities with regard to wrecks lying within the area they control, holds that the defenders were in the circumstances of this case under no obligation to take any steps with regard to these "wrecks," because the danger (if any) was manifest, and was specially known to the pursuer, who must be held to have accepted such risk as there was; I entirely concur in that view. In his reclaiming petition the pursuer relies on sec. 57 of the Harbours Act as importing an absolute obligation on the harbour authority to remove these vessels from the harbour altogether as "unserviceable." The section deals with vessels "laid by or neglected as unfit for sea service," a case that seems to be quite distinct from the "wrecks or obstructions" dealt with in the preceding section, and the same averments can hardly fit both sections. The condescendence here seems to have been drawn to suit sec. 56, and there are no such facts averred as would bring the case within section 57. Besides, there is room for doubt whether the latter section is mandatory for the harbour authority.

The last objection taken to the relevancy is that the pursuer has not averred facts and circumstances inferring that the loss of his boat followed, according to the natural course of events, as a direct consequence of the non-removal of the wrecked boats of which he complains. On the contrary, it is clear from his statement that the proximate cause of the trouble was a gale of exceptional violence—to judge from its effects, as narrated in condescendence 3—which swept this open harbour, driving some large fishing boats from their anchorage on the opposite side of the harbour, down upon the pursuer's boat, so that she broke adrift and was "blown down on the wrecks," and had her bilges pierced, and sank. Pursuer, who was on board at the time, saved himself by climbing aboard the smack, which had been sent careering by the impact of another boat torn from its moorings, and had followed immediately in the wake of pursuer's boat. He avers that, had the sunken boats been afloat, he would have suffered less damage by his collision with them, and he actually suggests that, but for their barring the way, he could have worked clear with the aid of his engine. He does not specify the distance between his berth and the wrecks, but he admits that he was penned in by other boats as well. It is obvious that, under the conditions described, his chance of getting clear was a forlorn hope, and, if it failed, he must blame himself for berthing where he did, knowing how the next berth was occupied, knowing the capabilities of his boat better than the defenders, and quite as able as they to gauge the weather risks in an exposed situation. The loss with which he seeks to saddle the defenders is, in my opinion, too remote from their alleged act of negligence, and consequently his claim for damages would be excluded, even if he were in a position to prove his averments in full.

I have reached substantially the same conclusion as the Sheriff-Substitute has stated in his note; but I think the appropriate finding is that the action is irrelevant, and should be dismissed, and I have altered the interlocutor to that extent. I think the defenders are entitled to their expenses in the appeal, subject to a slight modification in respect of the alteration in favour of the pursuer. J. M.

For pursuer—Mr. T. S. H. Burns & Son, Dingwall, and Mr. C. Scott Mackenzie, Stornoway.

For defenders—Mr. J. M'Laren Small, Stornoway.

No. 67.
Stirlingshire
Falkirk and District United Co-operative Society, Ltd. v Potter, Jun.

SHERIFF COURT OF STIRLINGSHIRE.

Falkirk and District United Co-operative Society, Limited, *Pursuers;* Finlay Mitchell Potter, Jun., *Defender.*

Lease — Removing — Small dwelling-house — House-Letting and Rating (Scotland) Act, 1911—*Period of tenancy.—Held* that secs. 4 and 12 of the House-Letting and Rating (Scotland) Act, 1911, invalidate a lease of a dwelling-house to which the Act applies for a period beyond the day upon which the next payment of rent falls due, or, if that is not a "lawful date," the "lawful date" next following the said day, and defence that the lease was a yearly one notwithstanding that the rent was paid quarterly repelled.

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, *sec.* 5 (1).—Circumstances in which proprietors were entitled to recover possession of dwelling-house for occupation of servant in their whole-time employment.

The pursuers raised a summary complaint for removing against defender to recover possession of a dwelling-house to which the House-Letting and Rating (Scotland) Act, 1911, applied. They averred that defender was a quarterly tenant, and was duly warned to remove at 28th November, 1921, the date upon which his tenancy ended. Defender pleaded (*a*) that he was a yearly tenant; (*b*) that his lease did not expire until 28th May, 1922; (*c*) that said lease had not been lawfully terminated by notice sent to him; and (*d*) that the proceedings were incompetent. Pursuers further averred that the house was reasonably required by them for the occupation of a whole-time servant in their employment. This the defender denied.

It was proved that defender had not occupied the house during the period of the let, but had sub-let part of same to a sub-tenant, who, prior to the date of the proof, had removed from same.

The Sheriff-Substitute (Robertson) repelled the defences, and granted decree as craved.

The following opinion was delivered at judgment:—

Dec. 19, 1921
Sheriff Robertson

Falkirk, 19*th December*, 1921.—The pursuers are the proprietors of a house at 79 Main Street, Bainsford, of which the defender has been tenant for many years. They ask for a decree of summary removing against him.

The defender pleads in the first instance that a summary

removing is incompetent in respect that he is in possession of the house under a yearly lease. This plea raises an interesting question.

There is no doubt but that the defender prior to Whitsunday, 1912, was in possession of the house as a tenant from year to year. He contends that by tacit relocation his tenancy has since that date been renewed upon the same terms.

But in December, 1911, there was passed by Parliament the House-Letting and Rating (Scotland) Act, 1911, which came into operation so far as Falkirk is concerned at Whitsunday, 1912. The main purpose of that Act was to provide that with regard to "small dwelling-houses" the proprietor should be responsible to the rating authorities for the rates levied upon occupiers as well as for these levied upon owners, and to make provision for the recovery by the owners from the occupiers along with the rent of those occupiers' rates. The Act, however, did a great deal more; it imposed a number of restrictions upon the freedom of proprietors and tenants to contract with reference both to the commencement and the termination of leases of such "small dwelling-houses"; and it declared null and void any agreement made in contravention of its provisions.

Inter alia, it provided (sec. 4) that "notice to terminate the let of a small dwelling-house on the day upon which the next payment of rent falls due may be given by either the owner or the occupier and shall be given by either party in accordance with the provisions of the Sheriff Courts (Scotland) Act, 1907, with respect to notice to terminate a tenancy, but (except as hereinafter mentioned) shall expire only at noon on the day on which the next payment of rent falls due; unless that day is not a lawful date for the termination of a let under this Act in which case it shall expire only at noon on the lawful date next following the said day. . . ."

While it cannot be said that this clause is a model of good draughtsmanship, it seems to me, when read along with sec. 12, to make it reasonably clear that, at any rate, tacit relocation of a "small dwelling-house" for a period of one year is invalid, unless it was a term of the original contract of let that the rent should be payable for the year in one payment either at the beginning or the end thereof; for under the provisions of sec. 4 either landlord or tenant has the power to bring it to an end at the date when the next payment of rent becomes due by giving the appropriate notice, while, under the terms of sec. 12, any agreement to the contrary is null and void.

Since in the present case the defender admits that his

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house is a "small dwelling-house" within the meaning of the Act and cannot allege that there was any arrangement for the payment of his rent in one annual payment, that is enough for the disposal of his plea. The case, however, is stronger against him, for the evidence is to my mind conclusive that since Whitsunday, 1912, the rent has by arrangement been payable quarterly. Applying the terms of sec. 4 to the facts, I am compelled to hold that the lease has since then been under the statute terminable at the end of any quarter at the instance of either party.

The defence as to the competency of the action therefore fails.

The defender further founds upon the terms of sec. 5 (1) of the Increase of Rent, &c., Act, 1920. I cannot sustain this defence. Upon the evidence, I have no hesitation in holding that the pursuers reasonably require the house in question for the occupation of a servant in their full-time employment. As the pursuers were admittedly proprietors long prior to 1917, the only other question is whether greater hardship would be caused by refusing the warrant craved than by granting it. Since if I refuse the warrant the pursuers' servant with his wife and four children will be all without a roof over their heads, whereas if I grant it the defender will be deprived of the possession of a house which he has not occupied for over eight months, it seems to me reasonably clear where the greater hardship would be.

I accordingly grant the warrant craved.

J. A. T. Robertson.

For pursuers—Mr. Hugh P. Black, Falkirk.
For defender—Mr. William Stevenson, Falkirk.

SHERIFF COURT OF MIDLOTHIAN.

No. 68.
Midlothian
Brown v Anderson, &c.

Laurence Murray Brown, *Pursuer;* Oliver Anderson and Another, *Defenders.*

Sale of goods—Minor—Necessaries.—Circumstances in which *held* that the purchase of a bicycle by a minor without the consent of his curator was reducible by way of exception, and without proof of lesion, a bicycle not being a necessary for the minor.

This was an action against a minor and his curator for the price of a bicycle sold by the pursuer to the former. The particulars of the transaction are stated in the interlocutor of the Sheriff-Substitute (Neish). The parties had been allowed a proof of their averments by the Sheriff-Substitute (Guy), before whom the case was tabled—

MIDLOTHIAN
Brown *v* Anderson, &c.
Feb. 15, 1921
Sheriff Guy

EDINBURGH, 15*th February*, 1921.—The Sheriff-Substitute, having heard parties' procurators and considered the cause, before answer allows both parties a proof of their respective averments and to each a conjunct probation.

JOHN C. GUY.

Note.—The pursuer has now ascertained that at the date of his alleged sale to the defender of a motor bicycle the defender was over twenty and under twenty-one years of age, and was therefore in minority. He says and offers to prove that the defender's appearance, actings, and conduct at the time of the alleged sale were such as to reasonably lead pursuer to believe that the defender was in majority. The defender denies this, but does not say that he informed the pursuer that he was major, but seeks to impose a duty upon the pursuer of discovering for himself whether he, the defender, was major or minor. Although that is averred by the defender, and is more or less an averment of law, I have not thought fit to except it from probation. The defender's account of the whole story was that, while he did not say he was a minor, he said that he had no money to pay for the bicycle, and desired to take it away to Edinburgh in order to get his father's consent to the purchase, and that, having taken it to Edinburgh, his father refused consent, and that he thereafter informed the pursuer of this, and returned the bicycle to him. These are, of course, two quite contrary views as to what took place between the pursuer and defender, and before I can come to any conclusion on the law of the matter relating to minority and consent of curators I must ascertain the facts. I am offering no further opinion upon the law until I have so ascertained the facts.

J. C. G.

July 25, 1921
Sheriff Neish

EDINBURGH, 25*th July*, 1921.—The Sheriff-Substitute, having heard parties' procurators and considered the proof, productions, and whole cause, finds in fact (1) that on 20th August, 1920, the pursuer sold to the defender a second-hand motor bicycle at the price of £45; (2) that the defender took the bicycle away with him and told the pursuer that he was going to his father to get the £45, and would bring it to him on the following Tuesday, 24th August; (3) that the defender has not paid the £45; (4) that the defender at the date of the sale was a minor, having been born on 18th July, 1900; (5) that the defender's father, who is *ipso facto* his curator, refused to sanction the purchase of the bicycle or to pay the £45; (6) that the defender returned the bicycle to the pursuer in good order on 8th October, 1920; (7) that the bicycle was not a necessary for the defender: Finds in law that the defender being a minor at the date of said sale,

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Sheriff Neish

and having purchased said bicycle without the authority or consent of his curator, is entitled to reduce said sale *ope exceptionis* and without proof of lesion; and that the defender having returned said bicycle to the pursuer in good order is not liable to the pursuer for the sum sued for; therefore assoilzies the defender from the crave of the initial writ, and decerns; finds the pursuer liable to the defender in the expenses of process, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report. E. W. Neish.

Note.—The main facts in this case are, I think, not in dispute. At the time the defender bought the motor bicycle, for the price of which he is now sued, from the pursuer, he was aged twenty years and one month. He was therefore a minor, and his father was *ipso facto* his curator (Gloag on Contracts, p. 93, note 4). There is no suggestion that the defender held himself out as major to the pursuer. The defender might readily have been taken for twenty-one or over from his appearance, but I do not think this consideration affects the law of the question. It is not suggested that the defender told the pursuer his age, although the defender thinks the pursuer might have inferred that he was under age from the admitted fact that he told the pursuer that he would have to get the money from his father. On the other hand, the pursuer did, I think, know that the defender was a pupil on a farm. The truth is, of course, that when the sale was effected neither party considered the question of defender's age.

No doubt the defender's father was remiss in not at once intimating his repudiation of the bargain to the pursuer. The delay on the defender's part may to some extent be excused by the accident with which he met.

The only fact about which there is any dispute is the condition of the bicycle when it was returned to the pursuer on 8th October (No. 15 of process). The defender says, or implies, that the bicycle was returned in good order. The pursuer says it was not in good order, but when further examined on this point he says there were some loose nuts, bolts, and fastenings, and that he did not try the bicycle after its return. I see no reason to suppose that the loose nuts, &c., could not have been easily tightened up, and I think it is a fair conclusion that the bicycle was returned in reasonably good order.

Such being the state of facts, the law, so far as I can ascertain, is as laid down by Professor Gloag in his book on Contracts at p. 97, and I have so found in my interlocutor.

No doubt if the bicycle was a necessary or the purchase was beneficial to the defender the sale might stand, but I do not think either of these propositions can be affirmed. It

therefore appears to me that the pursuer, in spite of the sympathy which one has for him in the transaction, must fail in his claim E. W. N.

For pursuer—Mr. J. BAKER WILSON, Edinburgh.
For defenders—Mr. J. LESLIE MACCALLUM, Leith.

SHERIFF COURT OF PERTHSHIRE.

THOMAS MACPHERSON, *Pursuer;* WILLIAM SIMPSON, *Defender.*

Landlord and tenant—Increase of Rent, &c. (Restrictions) Act, 1920, *sec.* 5 (1) (*d*) *and* (*ii.*)—*House required for the occupation of a person necessary for the proper working of a farm—Finality of certificate by Agricultural Committee—Alternative accommodation.—Held* that a certificate granted by a County Agricultural Committee in terms of sec. 5, *supra*, was conclusive evidence that a dwelling-house was required by a landlord for the occupation of a person engaged on work necessary for the proper working of an agricultural holding.

The house in this case was situated at Prieston, being attached to a small piece of land which had, prior to 1911, been occupied and worked by pursuer's father as a separate holding. The defender was a subtenant originally of pursuer's father, John Macpherson, who died intestate on 13th October, 1919, survived by a widow and grown-up family. In 1911 pursuer and his father became joint tenants of the farm of Pitsundry (about a mile distant from Prieston) with the intention of working both places together. This was accordingly done, the management of both holdings principally devolving upon pursuer, in consequence of his father's advancing age and infirmity. After his father's death on 13th October, 1919, pursuer continued to manage the holdings as before, and from that date onwards paid the rents of both places by cheque drawn upon his own bank account. No other member of the family took exception to this course, or laid claim to the tenancy of the holdings or any part thereof, although in the valuation roll the occupiers appeared in the case of Prieston, as "the Reps. of John Macpherson," and in the case of Pitsundry as "the Reps. of John Macpherson and Thomas Macpherson." Pursuer, subsequent to his father's death, was recognised by defender as his landlord.

On 22nd September, 1921, pursuer sent defender a notice of removal, requiring him to vacate said house

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at Martinmas (28th November) following, and on 29th October he engaged a married ploughman to occupy said house and to work on both holdings for one year from said Martinmas term. Defender having failed to remove, pursuer obtained a certificate from the Agricultural Committee for Perthshire, to the effect that the dwelling-house in question was required for the occupation of a person engaged on work necessary for the proper working of an agricultural holding, and at once took out an action of removing.

Defender pleaded that the action was irrelevant, that he had received no legal notice to quit, also that, as no alternative accommodation reasonably equivalent as regards rent and suitability in all respects was available, the action was incompetent, and that pursuer had no title to sue.

With reference to the question of alternative accommodation, pursuer maintained that the certificate by the Agricultural Committee under sec. 5 (1, sub-sec. (ii.), of the Act fell to be regarded as final, and that accordingly the existence of alternative accommodation was unnecessary as a condition of an order or judgment. This view was taken by the Sheriff (Sandeman) on appeal, who granted decree in favour of pursuer. The judgments of the Sheriff-Substitute and the Sheriff are contained in the following interlocutors:—

Feb. 28, 1922
Sheriff Boswell

Perth, 28*th February*, 1922.—The Sheriff-Substitute, having considered the cause, finds in fact (1) that the heir of the deceased John Macpherson has implicitly renounced his claim to tenancy of the house occupied by the defender; (2) that the pursuer is the tenant thereof; (3) that he gave the defender due and valid notice to quit; (4) that the said house is reasonably required by the pursuer, but no alternative accommodation is available; (5) that the said house is not necessary for the proper working of the pursuer's farm: Finds in law (1) that the pursuer is the "landlord" in the sense of sec. 12 (1) (*g*) of the Act 10 and 11 Geo. V. cap. 17, and (2) that a certificate in terms of sec. 5 (1) (ii.) of the said Act is not final and conclusive evidence of any fact; under the powers contained in sec. 5 (1) of the said Act refuses to issue judgment and dismisses the action; finds no expenses due to or by either party. C. P. Boswell.

Note.—My first finding in fact is based on the view that if an heir to a lease does not enter in a year or so he loses his right (*M'Iver*, 1909, S.C. 639).

The wording of the sub-section relating to an Agricul-

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tural Committee's certificate (sec. 5 (1) (ii.)) is unfortunately of a kind all too common in the Act. What it means to say is clear enough. The certificate is to be that the house is necessary for the proper working of the agricultural holding, that is to say, that there are not houses enough without it. The Committee here have not (in No. 9) certified that and did not mean to certify it. What they meant was that the house was necessary if the pursuer was to employ a married ploughman. Now, while it is inconvenient for the pursuer not to have a married ploughman, it is not "necessary" that he should have one. It is frightfully inconvenient not to have a house for Smeaton, but that is all that can be said. He could have gone on with the bothy and unmarried men (pp. 2, 18 and 20). I need hardly say that on all purely agricultural questions I should willingly defer to the views of the Committee, but I cannot divest myself of the responsibility of considering inferences of fact.

No expenses have been awarded because the defender was far too long in letting the pursuer know that he intended to stay and claim what benefit he could get from the Act. The pursuer, on the other hand, should have taken greater care and has been unsuccessful.

I have not dismissed the action because it is incompetent, but because I think judgment should not issue. The Act does not prohibit an action being brought. The distinction is academic at present, but may become important as the time limit of the Act is approached. C. P. B.

June 28, 1922
Sheriff SANDEMAN

PERTH, 28*th June*, 1922.—The Sheriff, having considered the cause, sustains the appeal for the pursuer; recalls the interlocutor of the Sheriff-Substitute of 28th February, 1922, complained of; finds in fact (1) that the heir of the deceased John Macpherson has implicitly renounced his claim to tenancy of the house occupied by the defender; (2) that the pursuer is the tenant thereof; (3) that he gave the defender due and valid notice to quit; (4) that the said house is reasonably required by the pursuer, but no alternative accommodation is available; (5) that the said house is necessary for the proper working of the pursuer's farm: Finds in law (1) that the pursuer is the "landlord" in the sense of sec. 12 (1) (*g*) of the Act 10 and 11 Geo. V. cap. 17; and (2) that the certificate (No. 9 of process) is conclusive evidence that the said house is required by the pursuer for the occupation of a person engaged on work necessary for the proper working of his farm; therefore grants decree in terms of the prayer of the writ and decerns; finds the defender liable to the pursuer in his expenses of the cause and of the appeal; allows

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Sheriff Sandeman

an account thereof to be given in; remits the same when lodged to the Auditor to tax and to report and remits the case to the Sheriff-Substitute. Condie Sandeman.

Note.—I agree with the learned Sheriff-Substitute except as to the quality of the certificate of the Agricultural Committee of Perthshire granted in terms of sec. 5 (1) (ii.) 10 and 11 Geo. V. cap. 17. That section provides—"Where the Court is satisfied by a certificate of the County Agricultural Committee or of the Minister of Agriculture and Fisheries pending the formation of such committee, that the dwelling-house is required by the landlord for the occupation of a person engaged on work necessary for the proper working of an agricultural holding."

This section, I think, prescribes a cheap procedure by which the question involved is to be settled. It prescribes the mode by which the Court is to be satisfied. It comes within the class of case where a new statutory right is created and a mode of enforcement given, and in such cases the ordinary jurisdiction of the Court is superseded (*Denny Brothers* v. *Board of Trade*, 1880, 7 R. 1019; *Passmore* v. *Oswaldtwistle Urban Council*, 1898, A.C. per Lord Halsbury, p. 394). C. S.

For pursuer—Chas. P. Campbell, Perth.
For defender—John A. Stewart & Campbell, Perth.

SHERIFF COURT OF ORKNEY & SHETLAND.

No. 70.
Orkney and Shetland
Low v Horne

James B. Low, *Pursuer;* John Horne, *Defender.*

Sale—Cow in calf—Warranty—Representations by seller.—Circumstances in which it was *held* that in the sale of a cow no warranty was given that she was in calf.

This was an action at the instance of Mr. J. B. Low, farmer, Upper Persley, Woodside, Aberdeen, against Mr. John Horne, farmer, Cauldhame, South Ronaldshay, for damages in respect of a red and white polled Orkney cow sold by defender to pursuer at Cauldhame aforesaid on 22nd February, 1922, for £35, and which cow pursuer alleged was warranted to be in calf and time up on 5th or 6th April, 1922, and was disconform to warranty in respect it was ascertained that the cow was not in calf. Pursuer restricted his damages to £20. The circumstances of the case are fully detailed in the judgment of the Sheriff-Substitute (A. Martin Laing), which is as follows:—

July 25, 1922
Sheriff Laing

This is a small debt action by Mr. Low against Mr. Horne for damages which he restricts to £20, in respect of a cow

sold by defender to pursuer, on 22nd February last, which the pursuer says was warranted to be in calf and time up on 5th or 6th April, 1922, being disconform to warranty, the cow eventually proving to be not in calf.

Any difficulty there is in this case is not so much in the application of the law to the ascertained facts as in the ascertainment of the precise facts. Shortly stated, the pursuer's case is that the defender's servant asked him "what the cow would be worth at calving"; that he asked when her time was up, and was told 5th or 6th April; that he said she would be worth £40 on calving; that he could do with the cow for his own dairy, and offered the defender £35 for her, which offer was not then accepted. All this he states took place in the presence of the defender. That thereupon his witness Mackie, who was outside the byre holding the pony, was called in, and the servant Sinclair sent out to hold the pony. That pursuer told Mackie to look at the cow; that Mackie asked the defender if the cow was in calf, and defender answered "Yes," and the pursuer himself told Mackie her time was up on 5th or 6th April. That, from the appearance of the cow, remarks were made which elicited the information from defender that the cow might calve on 14th March or 5th or 6th April, as she had been to bull on two dates that might result in her calving at either of the dates.

The evidence of the defence is entirely different. The defender says the first intimation he had about the possibility of an offer for the cow—which up to that point he had never thought about selling—was when pursuer on his return from the byre after his second visit to view an ox, offered £35 for the cow; that though he had not previously thought of selling her, he consulted with his people. Later pursuer, Mackie, defender, and Sinclair were in the byre, and Sinclair asked defender when her time was up, and he gave the before-mentioned dates, and made the statement about being twice served. Defender's witness, the servant man Sinclair, generally corroborates the defender's story, and says it was he who first drew the pursuer's attention to the cow, and asked pursuer her value at Aberdeen when her time was up, and informed the pursuer that would be on 5th or 6th April, and that when later pursuer, defender, and himself were in the byre he asked the defender the exact date when the cow's time was up, in order to verify the information given by him to pursuer. Defender and Sinclair both say that Sinclair never did go out to hold the pony. There are several discrepancies in the evidence of the parties as to the happenings.

But the pursuer founds his case on this. Sinclair asked

him the value of the cow at time of calving, which Sinclair, in defender's presence and with his acquiescence, stated to be 5th or 6th April, that he stated he could do with her for his own dairy, that he offered £35 for her; that later defender, in presence of pursuer and Mackie only, stated to Mackie (who was examining the cow on pursuer's behalf, and who was not present when the preceding acts took place), in answer to Mackie's question, "Is she in calf?" answered "Yes," and that pursuer himself informed Mackie, in defender's presence, that her time was up on 5th or 6th April. Mackie's evidence differs in this, that he says his question was, "Is she a calving cow?" The pursuer maintains this was a sale to him of a calver cow, which means that the defender warranted that the cow was in calf and would calve round about 5th or 6th April, or if first service had resulted in procreation, then possibly on 14th March.

I think it is clear that both parties believed and thought the cow was in calf. It is stated the price of £35 was the value of the cow if she were in calf, and that it is too much if she were farrow, and the defender concedes that £35 was the value if she were in calf. It turned out that the cow was not in calf at date of sale.

The pursuer relies for his alleged warranty on the form of question put to him by defender's servant, Sinclair—the value of the cow at time of calving—plus the defender's answer to Mackie's question, "Is she a calving cow?" or, as the pursuer states it, "Is she in calf?" His second argument is that it was a sale of a cow for a particular purpose made known to the seller, *i.e.*, for his own dairy—and, consequently, as farrow cows are of no use for such purpose, he warranted her fit for that purpose, *i.e.*, a calver cow. The latter contention is easily disposed of. The only evidence about it is the pursuer's own statement that he remarked "I could do with her for my own dairy." Defender and Sinclair admit that he did make some such remark. But that is not sale for a particular purpose made known to the seller. It is merely an expression by the buyer himself that he considered her fit for a particular purpose. The pursuer's contention on this head must be rejected.

With regard to pursuer's first ground—express warranty—I have already pointed out the difference in the statement of pursuer and Sinclair as to the exact terms of the question put by the latter, the one alleging it was "time of calving," the other "at her time." There is also a difference between the version of the pursuer and his witness Mackie as to the exact terms of the question put by the latter to the defender. The pursuer says it was "Is she in calf?" Mackie says it was "Is she a calving cow?"

The express warranty that the pursuer seeks to establish as having been given is that the cow was at date of sale actually in calf, or that she was a cow that would produce a calf at a date corresponding to the date of service. Now, both of these relate to something that neither of the parties could know for certain. That would not preclude the possibility of the defender giving a guarantee about such a matter; but in order to prove such a guarantee there would need to be clear proof that such a guarantee was given and the actual terms used. Guarantees in cattle dealing are customarily given only in regard to facts which the seller knows or could be expected to know, *e.g.*, correct age, teats correct, good milker, quiet, non-kicker, &c. As stated, in order to establish a warranty as to a non-ascertainable fact, although perhaps an examination by a veterinary surgeon might have determined her condition at any given time, the pursuer would require to prove clearly that such a warranty was given, and also the terms used in making such a warranty. The actual use of the word "warrant," or "guarantee," is not essential to the existence of a warranty; it is sufficient if words have been used which in effect amount to an undertaking of responsibility that the thing sold is such as it is represented to be. Can the words alleged by pursuer to have been used be held to amount to a warranty that the cow was actually in calf and would produce a calf on 5th or 6th April, or mayhap on 14th March? She had been bulled on 14th June and 5th July, and since the latter date she had failed to show any of the usual signs that she was not in calf. The defender had therefore reasonable grounds to believe she was in calf, and did believe she was in calf. But I do not think anything that the defender or his servant said, or any acquiescence of the defender in any statements of his servant could be strained to mean, that there had been an undertaking of responsibility by the defender that the cow was in calf. What both parties thought they were buying and selling was a milch cow—not a farrow cow for killing purposes—and a cow that, as a result of her time of service, might be expected to produce a calf round about a stated date if the usual consequence followed upon the service. I respectfully agree with the statement of the Sheriff (Vary Campbell) in *Routledge Bros.* v. *M'Clew's Trustees*, 1889, 5 Sh.Ct.Rep. 212. On a matter of this sort, if the purchaser attached special importance to the cow being in calf, and desired a warranty, it was for him to stipulate for it and receive it. Apart from a distinct and unmistakable intention on both sides to take and give a warranty in the above terms, I do not think it reasonable to construe the words as more than a representation pledg-

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ing the seller's honest belief to the fact alleged, entertained, not recklessly, but upon grounds usually held to be satisfactory by breeders of horses or cattle. Possibly a veterinary examination might have disclosed the fact at the time of sale that the cow was not in calf; but there was no recklessness or negligence on the defender's part in not having such an examination before making the statement he did. He thought she was in calf; so also did the pursuer. That would be sufficient to dispose of the case even assuming for argument the circumstances most favourable to the pursuer that the words used were "time of calving," and that Mackie's question was "Is she in calf," and that defender answered "Yes." But I hold the pursuer has not proved these words were used. According to his own evidence, when he put the question to defender's servant there were only present the servant, pursuer, and defender; and the servant and defender deny that these were the words, and state that it was "when was her time up?" In regard to Mackie's question, the statements of pursuer and Mackie are different. When it is a question of determining whether a warranty was given, and, if so, to what extent, it is essential that the exact words used should be proved. Much more so is that the case regarding an alleged warranty as to a matter which no one could absolutely guarantee would take place. To show that such a heavy responsibility was meant to be undertaken, and was, in fact, undertaken, it would need to be clearly proved.

The pursuer relied upon the cases, *Reid* v. *Leith*, 24 Sh.Ct.Rep. 285, and *Henderson* v. *Macdonald*, 24 Sh.Ct.Rep. 357. Neither of these cases are, in my opinion, an authority on the present case. In the former an animal was bought by a butcher for killing purposes, and for which purpose the pursuer knew he only did buy animals. It was a sale for a particular purpose carrying an implied warranty of fitness for that purpose. That I understood was the ground of judgment, and not that stated in the last sentence of the Sheriff's (M'Lennan) judgment, with which I am not at all sure I can agree. In Henderson's case there was a warranty given, and the giving and the terms of it were admitted, and the warranty was in fact fulfilled; but there was a defect present which was not covered by the warranty. By a widespread custom which had been proved to the satisfaction of the judge, the presence of the defect stated in the sale of any milch cow, as a milch cow, though not covered by the warranty, enabled the purchaser to return the cow, and it was on satisfactory proof of that custom alone that he found for the pursuer. No analogous custom relating

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to a cow sold as in calf and proving not in calf was stated or proved in this case.

Apart from warranty, the law as to the buyer of a milch cow is that his eye is his merchant. I think both pursuer and defender believed they were buying and selling a cow in calf—the latter from the fact of her service and no signs of her not being in calf, and the former from her appearance, and the acceptance of the defender's statement that she had been bulled on a particular date. Both were mistaken. On whom is the loss to fall? I think it is clear that the purchaser must bear the loss should a cow believed to be in calf prove not to be so, unless he can prove that a warranty was given at time of sale that she was in calf.

In the whole circumstances I must hold that the pursuer has failed in his proof, and I assoilzie the defender and find the defender entitled to modified expenses of £2 2s.

A. MARTIN LAING.

For pursuer—Mr. F. BUCHANAN, Kirkwall, for Messrs. Allan, Buckley Allan, & Co., Aberdeen.
For defender—Mr. J. C. MORRICE, Kirkwall.

SHERIFF COURT OF STIRLINGSHIRE.

No. 71.
STIRLINGSHIRE
Stirlingshire Law Agents *v* Frew

LAW AGENTS OF WESTERN DISTRICT OF STIRLINGSHIRE, *Reporters;* JOHN B. FREW, *Objector.*

Process—Appointment of agents for the poor—Objections—Law Agents Act, 1873, *sec.* 13—*Sheriff Courts Acts*, 1907-1913; *rules* 159 *and* 160.—

In connection with the annual appointment of agents for the poor in the Western District of the county of Stirling, the Sheriff (MACPHAIL) made the following order:—

"Stirling, 25th September, 1922.

"The Sheriff of Stirling, Dumbarton, and Clackmannan appoints the enrolled law agents in the Stirling or Western District of Stirlingshire to meet in the Procurators' Room, County Buildings, Stirling, upon Thursday, the 5th day of October, 1922, at half-past eleven o'clock forenoon, for the purpose of nominating four of their number to act as procurators for the poor in the said district of Stirlingshire for the year from that date; and appoints the names of those so nominated to be forthwith reported to the Sheriff, all in terms of the Sheriff Courts (Scotland) Acts, 1907-1913.

"(Signed) J. R. N. MACPHAIL."

The law agents referred to met accordingly, and appointed four of their number, being those named in his lordship's interlocutor (*infra*), and this was

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reported to the Sheriff by Mr. Alexander Paterson, secretary of the Stirling Society of Solicitors.

One of the agents nominated (Mr. Frew) claimed to be exempted from the duties involved in his nomination for, *inter alia*, the following reasons, that, although he resided in Kilsyth and had two small public appointments there, his office was not there, but in Glasgow. In these circumstances, he claimed to be exempted from acting as procurator for the poor. Mr. Paterson, on the other hand, in letter to the sheriff-clerk of 10th October, 1922, referred to in said interlocutor, mentioned that Mr. Frew's name was entered in the Scottish Law List under Kilsyth as practising there, and that he (Mr. Paterson) was under the impression that Mr. Frew had an office in Kilsyth, as he was entered as clerk to Kilsyth School Management Committee and Education Trust, and as prosecutor in Burgh Police Court. He pointed out, too, that Mr. Frew had subscribed the roll of law agents practising in Stirling. This letter was submitted to Mr. Frew, who replied that the insertion of his name in the Law List under Kilsyth as practising there had been by mistake. He had no office in Kilsyth, though he held the appointments referred to. He had subscribed the roll of law agents practising in Stirling, but a great many other Glasgow agents had also subscribed that roll. Mr. Frew accordingly reiterated his claim that, not being a solicitor practising in Stirlingshire, he was not bound to act as agent for the poor.

The provisions of the Sheriff Courts Act with regard to the poors roll are contained in rules 152 to 169 of the Sheriff Courts Act of 1907 (*q.v.*). Sheriff Macphail's judgment was as follows:—

Oct. 21, 1922

Sheriff Macphail

Stirling, 21*st October*, 1922.—The Sheriff, having considered the nomination by the law agents enrolled in the Stirling or Western District of Stirlingshire of Messrs. James S. Henderson, solicitor, Stirling; John B. Frew, solicitor, Kilsyth; John A. Maclachlan, solicitor, Stirling; and John M. Mailer, solicitor, Stirling, as procurators for the poor in the said district for the year to 30th September, 1923, as also the objections stated by the said John B. Frew, repels the said objections, and approves of the said nominations.

J. R. N. Macphail.

Note.—By the Law Agents Act, 1873, sec. 13, any en-

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rolled law agent may subscribe the statutory roll of agents practising in any Sheriff Court. By sec. 16 no person whose name is not on that roll may practise in such Sheriff Court.

Any person subscribing that roll does so presumably with the intention of practising before that Court, and so of competing with the other agents practising there. And it would seem only reasonable that those who share the statutory privileges should also share the statutory burdens effeiring to the position.

As I read the rules contained in the First Schedule to the Sheriff Courts Acts, 1907 and 1913, the agents for the poor in any Sheriff Court are to be nominated out of their own number by the agents enrolled in that Sheriff Court, and the Sheriff may, in special circumstances, refuse to confirm the nomination in whole or in part.

No such special circumstances are here averred by Mr. Frew. He boldly disputes the validity of his nomination and says, "I claim to be exempted from acting as procurator for the poor." In my opinion this contention is unsound, and I have therefore confirmed his nomination.

In view of what Mr. Paterson says in his letter of 10th October, it is perhaps hardly necessary for me to draw attention as I have done before to the terms of rules 159 and 160.

J. R. N. M.

SHERIFF COURT OF MIDLOTHIAN.

No. 72.
MIDLOTHIAN
Johnston *v* Johnston

Mrs. S. JOHNSTON, *Pursuer;* Miss CATHERINE JOHNSTON, *Defender.*

Payment—Legacy duty—Court of Session decree proceeding on agreed settlement—Share of executry estate.—Held that owing to the terms of settlement of an action raised by legatees against an executor for payment of their shares in a succession, the executor was barred from subsequently recovering from such legatees legacy duty paid by him on their shares.

In this Small Debt action the pursuer claimed the amount of legacy duty at 5 per cent. on £262 10s., being the share of the estate of the deceased William Johnston paid by the pursuer as executrix to the defender as one of the next-of-kin of the said deceased William Johnston in terms of the conclusion of the summons at the instance of the defender and others against the pursuer, said legacy duty having been paid by the said Mrs. S. Johnston as executrix aforesaid in terms of secs. 2, 6, and 23 of the Act 36 Geo. III., cap. 52, and repayable by the said defender to the pursuer. £13 2s. 6d.

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The defender pleaded that the pursuer had no right of reimbursement against the defender either under statute as claimed or even at common law or by agreement, standing the written terms of settlement in the Court of Session case mentioned in the claim (C.A.S., *B.* v. *Fisher* v. *Earl of Seafield*, 4 Shaw, 192, and Foster, 2 Bing. N.C. 269, referred to). This defence was sustained by the Sheriff-Substitute (Neish), whose interlocutor and judgment is as follows:—

June 26, 1922
Sheriff Neish

The defender in this case along with her three sisters raised an action in the Court of Session against the pursuer as executrix-dative *qua* relict of their deceased brother for declarator that a certain sum of money on deposit receipt was *in bonis* of the deceased at the time of his death and formed part of the executory estate and for payment to each of the pursuers in that action of £350 or such other sum as might be found due to them as next-of-kin of the deceased.

Before proof was led or an account lodged the action was settled for a payment of £262 10s. to each of the pursuers and expenses. Following on the settlement the Lord Ordinary decerned against the defender for payment to each of the pursuers of the agreed sum in full of the pecuniary conclusions of the summons with expenses.

The pursuer (defender in the Court of Session action) now sues the defender (one of the pursuers in the Court of Session action) for payment of legacy duty on the sum for which she got decree in the Court of Session. Nothing was said about legacy duty in the terms of the settlement in the Court of Session action.

No doubt it is an executor's duty to pay the legacy duty and deduct it from the sum paid to the legatee; but that is not, in my opinion, the position here. It is true that the defender claimed her share of the estate as next-of-kin but that question was not litigated to a conclusion. What the defender accepted and got decree for was an agreed sum and if the pursuer desired to deduct legacy duty she should have offered a smaller sum in settlement. It does not follow that the defender would have accepted the offer.

What in effect I am asked to do by the pursuer is to correct an oversight in the terms of settlement in the Court of Session action. I am quite clear that I have no jurisdiction to make such a correction and least of all in the Small Debt Court. I accordingly assoilzie the defender with expenses. E. W. Neish.

For pursuer—Mr. C. J. L. Romanes, Leith.
For defender—Mr. Peter Clark, Edinburgh.

SHERIFF COURT OF LANARKSHIRE.

No. 73.
LANARKSHIRE
Gordon v Henderson

MARY COUTTS GORDON, *Pursuer;* THOMAS BEVERIDGE HENDERSON, *Defender.*

Reparation—Road collision—Negligence—Main road and side road traffic.—Circumstances in which the Court found that the owner of a motor car which was being driven on a main road was not liable for damage caused to a cyclist emerging from a side road and colliding with his car. *Observations* as to respective obligations of main road and side road traffic.

Expenses—Minor pursuer—Father consenting as curator.—A father who gives his consent to an action at the instance of his minor child merely to make it competent and who neither promotes the action nor interferes with its conduct is not liable in expenses to the successful defender.

In this action of damages for personal and other injury the following interlocutors, which contain a sufficient statement of the facts, were issued by the Sheriff-Substitute (FYFE) and the Sheriff (A. O. M. MACKENZIE):—

March 17, 1922
Sheriff FYFE

GLASGOW, 17*th March*, 1922.—Having heard parties' procurators, and considered the cause, finds (1) that on 15th June, 1920, the pursuer, Mary Coutts Gordon, then aged 13, was riding a bicycle eastwards along South Erskine Park Road, Bearsden, which road runs into the Drymen Road; (2) that defender was driving his motor car northwards along the Drymen Road; (3) that on the Drymen Road the motor car collided with the bicycle; (4) that pursuer was thrown off her bicycle and sustained personal injury; (5) that her bicycle was badly damaged; (6) that pursuer was not in fault; (7) that defender was in fault, in respect (*a*) that he had not his car under such control as to enable him to avoid colliding with the bicycle; (*b*) that he made no sound signal to warn the pursuer that a vehicle was proceeding along Drymen road, upon which she was emerging from South Erskine Pard Road: Finds in law that pursuer, having sustained loss and personal injury owing to fault or negligence on the part of defender he is liable to her in reparation; assesses the same at £40, and decerns against defender for payment of that sum to pursuer, with interest thereon as craved; finds defender liable in expenses; allows an account to be given in; and remits to the Auditor for taxation.

Note.—I think it is pretty obvious that the explanation of this casualty is the not uncommon one—that defender entertains a wrong conception of the effect of the recent decision of the Supreme Court in regard to main road and side road traffic responsibility. The Drymen Road

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is a main road and South Erskine Park Road is a side road. The defender seems to have entertained the idea (which unfortunately is too prevalent amongst vehicle drivers) that because he was on the main road, he was entitled to carry on, and that traffic emerging from a side road must look out for itself. This is not the law. The obligation of a driver on a main road to observe due care has not been in any way lessened, or affected, by the recent decisions.

One obvious duty the defender neglected was to give a sound warning that he was about to cross over the mouth of South Erskine Park Road. If pursuer had been warned that a car was travelling northwards along Drymen Road, she might not have emerged at all till the car had passed. Not being warned, she was entitled to assume that she had a clear road and could safely emerge from South Erskine Park, and cross to the east side of Drymen Road, as she did. I think defender was in fault in failing to warn possible traffic on South Erskine Park Road of his approach.

I think also that defender was in fault in the matter of speed. He says, and so does his friend Mr. Hosie who was with him in the car, that they were going something like seven or eight miles an hour, but, although there was a speedometer on the car, neither of them seems to have judged the speed by that. I am rather inclined to think that their evidence amounts to no more than this—that they knew they were within a ten-mile-limit area, and thought that they were observing the regulations. I am afraid that a motor driver often does believe that he is keeping within the ten-mile-limit speed, when really his car is going much faster, and in this case I think that defender and his friend were mistaken about the speed. If defender had been going as slow as he puts it, he could quite easily have stopped the car, even if he did not see pursuer till she emerged from South Erskine Park Road. The defender on the matter of speed is rather on the horns of a dilemma. If he was going as slow as he represents, then he was in fault in not stopping dead, as the proof shows he had time and room to do. If he was going too fast to do that, then he was in fault in the matter of speed. The defender's account of his speed will not fit in with the actual happenings, which were possible only if the car was going at a considerable speed. On the matter of speed also I accordingly find that the defender was in fault.

There remains the question whether pursuer also was in fault, for defender alternatively pleads contributory negligence. Defender's theory about pursuer is that she had lost control of her bicycle, and was dashing down South Erskine Park at such a pace that even if she had got past the motor car she must have gone right across the Drymen Road and dashed into a stone wall on its east side. This

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theory is not consistent with what actually happened. The pursuer says she had her bicycle perfectly under control and was pedalling across Drymen Road, and there is no evidence to confute that. The actual happenings support pursuer's story. I do not think that excessive speed is brought home to pursuer, and upon the matter of speed alone the plea of contributory negligence is based.

Upon the whole case I think that pursuer is entitled to reparation, but the evidence to enable me to assess it is somewhat meagre. There were substantial outlays for the cost of repairs to her bicycle, and for medical attendance. The rest of her claim is of course solatium, which is always a matter of estimate. Pursuer was seriously bruised on her body and face, and she still feels the effect of a bad bruise on the right ankle. She also no doubt suffered for a considerable time after the accident from serious nervous shock, and in some degree suffers still, but she is a robust young girl, and there is nothing in the evidence to suggest that her health has been permanently impaired. I think that I treat her fairly if I assess the reparation damages at an inclusive sum of £40.

The action being an action of damages, and the defender having made no tender, he is liable in expenses, although the sum awarded is very much less than the sum sued for, as generally happens in such cases. T. A. F.

July 7, 1922
Sheriff MACKENZIE

GLASGOW, *7th July*, 1922.—The Sheriff, having considered the cause, sustains the appeal and recalls the interlocutor of the Sheriff-Substitute, dated 17th March, 1922. Finds in fact in terms of the first five findings in fact in said interlocutor; finds further in fact (6) that South Erskine Road is a side road in relation to Drymen Road; (7) that the pursuer has failed to prove that the accident was caused by the fault of the defender; and (8) that in any event the pursuer was negligent in crossing the Drymen Road in front of the defender's approaching motor car, and that her negligence in this respect contributed to the accident: Finds in law that the pursuer is not entitled to damages from the defender; therefore, assoilzies the defender from the conclusions of the petition: Finds him entitled to expenses against the pursuer Mary Coutts Gordon; allows an account thereof to be given in and remits the same, when lodged, to the Auditor of Court to tax and report; and remits the cause to the Sheriff-Substitute, with power to decern for the expenses now found due.

A. O. M. MACKENZIE.

Note.—The pursuer in this case sues for damages in respect of personal injury sustained by her and damage done to her bicycle in consequence of a collision with the defender's motor car. The accident took place in daylight

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on the Drymen Road at a point where South Erskine Road runs into that road from the west. At the time of the accident the pursuer, who was riding a bicycle, had come from South Erskine Road and was proceeding across the Drymen Road with the intention of going southwards along the road and the defender was proceeding northwards along the Drymen Road. South Erskine Road, which is a side road in relation to the Drymen Road, slopes downwards towards the point of junction at a gradient of 1 in 35, and from the point of junction Drymen Road slopes downhill towards the south in a gradient of 1 in 37. Accordingly, as the pursuer's bicycle and defender's motor car approached the point where the collision occurred, the pursuer was going downhill and defender uphill. The pursuer also was emerging from a side road and the defender was proceeding along a main road.

Now, in all cases of the kind the burden of proof necessarily lies on the pursuer, and in this case the weight of the burden, it appears to me, is increased by the fact that the pursuer was emerging, or had just emerged, from a side road at the time when the accident occurred. In saying this I do not differ from the observation made by the Sheriff-Substitute that there is an obligation on a driver on a main road to observe due care in approaching a side road. This is undoubtedly the case and has been pointed out in various decisions in the Court of Session, but the general rule is that traffic coming from a side road on to a main road must approach the main road with caution and be prepared, if necessary, to give way to traffic upon it.

Now, the faults alleged against the defender by the pursuer are that "he drove his car in a reckless and negligent manner and at an excessive rate of speed, and failed to keep a proper lookout, or to give warning of his approach." The Sheriff-Substitute has held that the defender has been proved to be in fault in respect that he failed to give warning of his approach to the side road by blowing his horn, and that he approached it at too high a rate of speed.

On the question of fact whether the defender blew his horn as he approached the side road, I am not prepared to differ from the Sheriff-Substitute; but assuming that the defender failed to perform his duty in this respect, I am unable to hold that his failure to do so was the cause of the accident, or that it relieved the pursuer from the duty of approaching the main road cautiously and in a state of preparedness for the traffic she might find upon it.

On the question of the speed of the motor car, I cannot agree with the Sheriff-Substitute's finding. The defender, and the witness Hosie, who was sitting beside him in the motor car, both deny that the motor car, which, as already stated, was proceeding uphill at the time, was going at a

rate of as much as ten miles an hour, and the only other witness who was present when the accident occurred, namely, the pursuer, admits that she could not judge whether the motor car was going fast or not. The direct evidence, accordingly, is entirely against the conclusion that the motor car was going at too high a rate of speed, and the Sheriff-Substitute can only have reached his conclusion on this matter by inference from the story told by the pursuer. I find myself unable to accept the pursuer's account of the circumstances in which the accident occurred as proved. In itself the pursuer's story appears to me to be improbable. She states that she free-wheeled down South Erskine Road with both brakes on and at so slow a rate of speed that when she came to the foot of the road she had to use her pedals in order to get across the Drymen Road; that when she came near the junction of the two roads she saw the defender's motor car at a distance which she estimates at 40 or 50 yards; that she pedalled slowly across the Drymen Road and had practically straightened up on the east side of that road, near the kerb, when she was run into by the defender's motor car. If this account of the circumstances of the accident were accurate it would certainly acquit the pursuer of responsibility for it and justify the conclusion that the accident was due to reckless driving or lack of ordinary care and skill on the part of the defender; but I have very great difficulty in believing that the defender, who is by no means a tyro in motor driving, could have been so reckless or unskilled as to have failed to avoid the pursuer's cycle, if the circumstances in which she emerged from South Erskine Road were as she states they were. There is also the additional difficulty in the way of accepting the pursuer's story that it is directly contradicted by the defender and the witness Hosie, who, so far as I can judge from the recorded proof, give their evidence very fairly. The Sheriff-Substitute seems to have thought that the pursuer's story was supported by what he terms the actual happenings, but he does not state what the particular happenings are to which he refers, and I have been unable to find support for the pursuer's story in the facts admitted or proved. Mr. MacFarlane for the pursuer argued that the nature of the damage caused to the bicycle supported the pursuer's story, but unfortunately the evidence does not very distinctly show the exact character of that damage but merely describes it in a general way as a bent frame and buckled wheels, and, on the evidence, I do not think it is possible to say to what extent the damage to the bicycle was caused by the collision between the two vehicles or by the pursuer subsequently colliding with the kerb on the east side of the road and the fall she sustained there. I find no reason, therefore, which would justify me in accepting the

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story of the pursuer as against that told by the defender and the witness Hosie, and their account of the matter puts a very different complexion upon it, for what they say is that the pursuer suddenly emerged at a high rate of speed from South Erskine Road, that the defender at once applied his brakes as quickly as possible on seeing her, but that he just failed to stop the car in time to prevent the front mudguard on the off side of the motor car coming in contact with the back wheel of the pursuer's bicycle. Both these witnesses agree that the accident did not occur near the kerb on the east side of the Drymen Road, but that it occurred on the west side of that road at the point of junction between it and South Erskine Road.

The only question upon which I have found any difficulty is whether the defender ought not to have seen the pursuer approaching the crossing in time to avoid colliding with her. Assuming that the accident took place at the point at which he says it took place, he must have had the pursuer in view, if he was looking towards South Erskine Road, while he travelled some little distance, even at the slow speed at which he was going. But, what the pursuer has to prove is that the accident occurred through want of ordinary care or skill on the part of the defender, and I think that the sudden emergence of the pursuer from the side road put the defender in a position of difficulty, and I am not prepared to find that he showed a lack of ordinary skill or care in failing to pull up his car in time to avoid the collision.

In any event, even if I had been of opinion that the defender had shown a lack of ordinary care or skill, which I do not think is proved, I should not have been able to award the pursuer damages, for I am distinctly of opinion that in attempting to cross the Drymen Road in front of the defender's motor car she was guilty of contributory negligence.

On the whole matter, therefore, while I sympathise with the pursuer in the injuries she sustained, I am of opinion that she has failed to prove that these injuries were caused by fault on the part of the defender, and therefore, that she is not entitled to an award of damages.

The defender's agent moved that the concurring pursuer should be found liable in expenses. I am not prepared to grant this motion. A father who gives his consent to an action at the instance of his minor child merely to make it competent, and who neither promotes the action nor interferes with its conduct, is not liable in expenses to the successful defender, *vide* Maclaren on Expenses, 232. No doubt it is probable, regard being had to the nature of the action and the age of the pursuer, that it was her father who decided that the action should be brought and gave instructions to that end, but there is no evidence upon the

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Gordon *v* Henderson
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point, and it is at least possible that the child may have been insured against such accidents. Moreover, it cannot be said, I think, that the father took a prominent part in the action, and in the absence of evidence that he promoted it, I am not prepared to find him liable in expenses.

A. O. M. M.

For pursuer—Mr. J. TURNER MACFARLANE (Messrs. Manson & Turner MacFarlane), Glasgow.

For defender—Mr. ROBT. F. BARCLAY (Messrs. Cowan, Clapperton, & Barclay), Glasgow.

SHERIFF COURT OF MIDLOTHIAN.

No. 74.
MIDLOTHIAN
Lawson *v* Stewart

Mrs. ANNIE BURNS or LAWSON (James Lawson's Executrix), *Pursuer;* WILLIAM STEWART, *Defender.*

Process—Proof—Lost document—Proving of the tenor—Competency.—In defence to an action for payment, the defender averred that the debt had been paid by cheque which he had handed to pursuer, and which had been duly cashed, but that the cashed cheque, after coming back from the bank to defender, had been mislaid by him, and he offered to prove the tenor of this missing cheque.—*Held* that it was incompetent to prove the tenor in the Sheriff Court, even as an incident in the main proof, and defender being unable to prove payment by writ or oath, decree was granted for the sum sued for.

The following was the interlocutor issued by the Sheriff-Substitute (ORR) in this action:—

July 19, 1922
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EDINBURGH, 19*th July*, 1922.—The Sheriff-Substitute, having heard counsel for the parties and considered the cause, sustains pursuer's first plea in law, and grants decree in terms of the crave of the initial writ; finds the defender liable to the pursuer in expenses, and remits to the Auditor of Court to tax the same, allowing fees to counsel, and to report. R. L. ORR.

Note.—The pursuer's late husband and the defender had various business dealings, and pursuer's case is that, after crediting defender with all the sums he has paid, there still remains £100 due by him to her as executrix. She accordingly sues in this action for payment of £100. The defence is that that sum has already been paid. Defender says he paid it by cheque dated on or about 20th October, 1918. The amount in the cheque was £192 18s., the £92 18s. being for a separate purchase not appearing in the account produced made by him on the same date, namely, on or about 20th October, 1918, and the £100 being a payment to account of his indebtedness in connection with the matters dealt with in the account produced. Defender goes on to say he handed the said cheque to Lawson in person at the market; it was duly cashed, and, after being met, was in

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due course handed to the defender, "who has meantime mislaid it." Defender, therefore, is not in a position to prove the alleged payment of £100 either by writ or oath. But he asks to be allowed in this process incidentally to prove the tenor of the lost or missing cheque, in order to enable him to substantiate his defence that he has paid the £100 now sued for.

It has been settled that an action of proving the tenor is not competent in the Sheriff Court (*Dunbar*, S.C. 1920, p. 210). Further, I take it as settled that it is incompetent incidentally to set up in the course of a Sheriff Court action the tenor of a document founded on as the basis of the action (*Walker* v. *Nisbet*, 1915, S.C., p. 639). In that case it was a pursuer who sought to set up incidentally the tenor of a document, so as to prove that he had paid a sum of money to a bank.

It appears to me that in principle it is immaterial whether it be a pursuer or a defender who seeks to set up incidentally the tenor of a document in order to prove payment by him of a sum of money. In either case he is seeking to do what cannot be competently done in this Court. The defender here is pursuer in the case which he tables and seeks to prove, namely, that he paid a certain sum by a cheque for a certain amount at a time and place specified, which cheque, after being cashed, was handed back to him. That case is founded on the writ the tenor of which is sought to be proved. *Wilson* v. *Leckie*, 1870, S.L.R. 563, does not appear to me to aid the defender. A written authority to pay money was lost, and the tenor was allowed to be proved incidentally. But the Lord President observed, "It would have been different, of course, if the document set up had been a title on which an action was to be founded." *Young* v. *Thomson*, 1909, S.C., p. 529, was also referred to, but that case was commenced in the Court of Session, and therefore has no real bearing on the present question.

The relevancy of the averments as bearing on the questions of adminicles and *casus amissionis* was also discussed, but in the view I take of the case it is unnecessary to deal with these matters.

The defender does not propose to raise an action of proving of the tenor in a competent Court. I shall therefore hold that his defences which aver payment by means of a cheque which is said to have gone amissing in defender's hands are irrelevant. R. L. O.

For pursuer—Mr. D. C. Blades, advocate, instructed by Messrs. Mitchell & Baxter, Edinburgh.

For defender—Mr. Neil A. Maclean, advocate, instructed by Mr. Herbert Mellor, Edinburgh.

DIGEST OF CASES

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Affiliation and Aliment—

Question involving status—Competency—Pater est quem nuptiæ demonstrant.—(1) An action of affiliation and aliment is primarily an action of debt, and it is not incompetent for the Sheriff to inquire into and, if necessary, decide incidentally a question of status on the way to arriving at a conclusion whether the defender is due the debt. (2) The maxim, *pater est nuptiæ demonstrant*, is only a *presumptio juris*, which may be redargued by proof. Pursuer's averments *held* relevant to entitle her to proof. *Fleming* v *Farmer*, ... 73

Arrestment. *See* DILIGENCE.

Bankruptcy—

Sequestration—Trusteeship—Objections—Production of vouchers with claim—Execution of claim by company—Bankruptcy Act, 1913, *secs.* 45 *and* 24.—*Held* (1) that landlords claiming under lease must produce their lease as a voucher with their claim; (2) that an ordinary director of a limited company is not a "principal officer" competent to execute a claim by the company as creditors in a sequestration. *Williamson's Sequestration*, ... 129

Carriage—

Carriage of goods—Consignee to pay freight on delivery—Damage in transit—Consignees' refusal of delivery—Consignors' title to sue carriers—Sale of Goods Act, 1893. *Adams & Co.* v *North British Railway Co.*, ... 3

Railway company—Passengers' luggage—Contributory negligence.—Held (1) that where personal luggage is taken with a passenger by rail into the compartment, the liability of the railway company is that of common carriers; (2) it is immaterial that the article was placed in the carriage by the passenger instead of by an employee of the company; (3) the fact that the article in question was placed under the seat of the carriage is not *per se* contributory negligence so as to exclude a claim for damages; (4) that the defenders were liable for damage sustained by the pursuer's suitcase through its having come in contact with a hot pipe placed underneath the carriage seat. *Observed* that apart from their liability as common carriers the defenders were liable on the ground of negligence. *Stuart-Brown* v *Caledonian Railway Co.*, ... 60

Railway—Consignment note—Owners' risk rates—"Wilful misconduct"—Contract conditions.—Circumstances in which railway company *held* not liable for loss of goods stolen in transit in respect that the goods had been consigned at owners' risk rates, and the loss was not attributable to "wilful misconduct" on the part of the railway servants. *Brown & Son, Ltd.* v *Caledonian Railway Co.*, ... 104

Railway ticket conditions—Breaking journey—"Day of issue."—Held a good contract condition that the outward half of a return ticket which permitted break of journey at specified stations could be used only on its "day of issue," and that the holder who had broken journey from off the last train on that day, and who on resuming his journey by the first available train next morning tendered the ticket, was bound again to pay the fare for the part of his journey not travelled on the previous day. *Portpatrick and Wigtownshire Joint Railway Committee* v *Brown*, ... 267

See also VITIOUS INTROMISSION.

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Company—

Agreement to take shares in proposed company—Mutual stipulations—Failure of consideration—Frustration—Power to resile.—*Held* that an intending subscriber who had offered to the promoter of an intended limited company to take shares in the prospective company and had paid a sum to account was entitled to repayment of that sum because (1) he had resiled before shares had been allotted to him; and (2) the contract had been frustrated because the company had no unallotted shares to allot to him. *Observed*—"An application for shares is no more than an offer which can be resiled from up to the moment of acceptance, and in the case of a limited company there is only one form of acceptance recognised by law, namely, an allotment note." *Love* v *Aitken*, ... 120

Allotment letter—Exchange for scrip—Loss of allotment letter—Contract—Condition precedent—Guarantee.—*Held* that an allottee of shares in a limited company was not entitled to receive from the company delivery of certificate for the shares allotted except on production of the receipted half of the allotment letter, the allotment having been made on condition of such production and exchange. *Query* as to delivery of certificates on execution of obligation of guarantee and indemnity. Forms of such obligations. *Smith* v *Commercial Bank of Scotland, Ltd.*, ... 242

Contract—

Breach—Stipulated payment—Penalty—Liquidated damages.—One of the conditions in a contract for sale of standing timber provided for certain payments to the seller in the event of the purchaser not clearing the ground by a specified date. *Held* that these payments were of a penal nature, and not an agreed assessment of damages. *Carnegie* v *Brown*, ... 111

Against public policy—Innominate—Promise of payment to wife refraining from raising action of divorce—Liability of executors of promisor—Proof.—The pursuer averred that in 1896 she informed her husband's father that she intended to sue for divorce on the ground of adultery, but that her father-in-law undertook, if pursuer would refrain from taking such action, to pay her an annuity of £1 a week for life; that she accepted this offer, and did not raise an action for divorce; that her husband died in 1913; that in 1912 she agreed to the annuity being abated to 15s. a week; that her father-in-law paid the annuity up to his death in 1919; and that his executors made payment of it up to 1921, when they ceased doing so. She now sued the executors for payment. *Held* (1) that the contract, even if relevantly averred, was illegal, and, in any event, being innominate, could only be proved by the writ of the deceased father-in-law, and (2) that pursuer's averments did not instruct a contract, but merely a promise personal to the deceased father-in-law; and, further, that proof of the obligation alleged to be incurred by the father-in-law and transmitted to his executors under this promise must be by writ. *Walker* v *M'Lean, &c.*, ... 152

Master and servant—Agreement in restraint of trade—Breach—Interdict.—Circumstances in which interdict refused against an employee who had left a firm and started business on his own account. *Observations* as to the necessity for specific averments on record to support application for interdict in such cases. *Ross & Co.* v *Hind*, ... 214

Writing—Printed note headings—Construction.—*Held* (distinguishing *Oakbank Oil Company* v *Love & Stewart*, 1918, S.C. (H.L.) 54) that printed note headings could not be imported as contractual matter into an agreement written on the notepaper bearing them. *Ross & Co.* v *Hind*, ... 214

Performance—Frustration of the venture—Apprenticeship—Failure of trade.—*Held* that an apprentice could not claim wages under his indenture or damages for breach, the contract having been frustrated owing to depression of trade due to foreign competition, in consequence of which British factories (including this particular employers' premises) had to close down. *M'Calmont* v *M'Neil & Sons*, ... 226

Damages for breach—Defence of frustration of the venture repelled.—*Held* that whether a contract has been frustrated is in each case a question of circumstances. *Observations* as to doctrine of frustration. *Robertson* v *Bessler, Waechter & Co., Ltd.*, ... 248

See also CARRIAGE, COMPANY, LANDLORD AND TENANT, MASTER AND SERVANT.

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Damages. *See* CONTRACT.

Deposit—

Custody—Duty of reasonable care—Burgh—Public slaughter-house.—Circumstances in which a burgh council, the proprietors and managers of a public slaughter-house, were *held* responsible for the loss of carcases stolen out of the slaughter-house, in respect that they had not exercised their duty of custody of the carcases with reasonable care and diligence. *Duncan* v *Provost, &c., of Cowdenbeath,* 84

Diligence—

Arrestment—Future or contingent debt—Sum to become due under contract—Furthcoming—Arresters' claim against common debtors impugned by arrestees.—Held (1) that arrestees cannot impugn arresters' claim against common debtors; (2) that a sum to fall due to common debtors under a contract is arrestable, although not prestable at time of arrestment and although contingent on the actings of the common debtors, and decree granted against arrestees for amount arrested. *Fritz's Agency, Ltd.* v *Moss' Empires, Ltd., &c.,* 124

Arrestment—Policy of life assurance—Furthcoming—Procedure.—The pursuer, who held a decree against the common debtor, arrested the contents of a policy of insurance on his life, and followed this up with an action of furthcoming. *Held* that the action was competent; and, surrender of the policy being more advantageous than selling it, the arrestees were ordained to lodge an actuarial certificate of surrender value, ordained to consign the ascertained surrender value; and were thereupon exonered and discharged. *Clark* v. *Scottish Amicable Assurance Society, &c.,* 170

Ejection. *See* LANDLORD AND TENANT.

Election (Parliamentary). *See* FRANCHISE.

Employers' Liability. *See* MASTER AND SERVANT.

Evidence—

Circumstantial—Claim for reparation—Burden of proof.—Held that the pursuer had proved his case, the inferences from the facts and circumstances pointing to the loss being due to fault of defenders, and their explanations and theories as to the occurrence not supplying any reasonable account of how the loss could have been otherwise caused. *Elliott* v *North British Railway Co.,* 17

Writ—Parole—Payment.—Held that the terms of a receipt vouching payment in full of balance of a merchant's account may competently be rebutted by proof *prout de jure. Scottish Motor Traction Co., Ltd.* v *Hughes,* 218

See also CONTRACT.

Expenses. *See* PROCESS.

Franchise—

Representation of People Act, 1918—*Election (Scotland) (Corrupt and Illegal Practices) Act,* 1890.—*Held* that the statutory provision prescribing a period of five days for appealing against a registration officer's decision to expunge a voter's name from the voters' roll in respect of the voter's conviction of a corrupt practice is peremptory, and, accordingly, that an appeal taken after expiry of the five days was incompetent. *Fletcher, &c.* v. *Wheeler,* 16

Harbour. *See* NEGLIGENCE.

Heritable Security—

Foreclosure—Heritable Securities Act, 1894—*Titles to Land Act,* 1868, *sec.* 119—*Transmission of personal obligation—Sufficiency of intimation.*—A property was burdened in 1871 by a bond and disposition, and in 1875 was sold, the bond being taken over and transmitted against the purchaser, but without discharge of the personal obligation of the former owner, the original granter of the bond. In proceeding to sell under the bond the

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Heritable security—*continued.*

bondholder gave the requisite intimation to the representatives of the then existing proprietor, against whom the bond had been transmitted, but did not give intimation to the representatves of the original granter of the bond. In subsequent procedure for foreclosing under the Heritable Securities Act, *held* that the intimation given was sufficient. *Bain, &c.* v *Riddell's Trustees, &c.*, ... 33

Highway. *See* LOCAL GOVERNMENT.

Housing and Town Planning, &c., Act. *See* PROCESS.

Husband and Wife—

Married Women's Property Act, 1877—*Liability of husband for debt contracted by wife antenuptially, but after proclamation of banns.*—*Held* that, not being *lucratus* by the marriage, the husband was not liable. *Kennedy* v *Peebles*, ... 80

Adherence and aliment—Offer by husband to provide home for wife—Accommodation in house of husband's mother.—Circumstances in which *held* that the offer by a husband to provide as a home for his wife and child accommodation in his mother's house consisting of a single room of which the spouses would have sole occupancy was sufficient and should be accepted by the wife. *Paden* v *Paden*, 117

See also CONTRACT.

Hypothec. *See* LANDLORD AND TENANT.

Insurance—

Life policy—Ownership—Lien on policy for premiums paid—Vitious intromission—Public Health Act, 1897, *sec.* 69 (2)—*Funeral expenses—Privileged debt.*—*Held* that a sanitary authority, which buried the body of a deceased person at the public expense, was entitled to recover the cost of the interment from persons who as vitious intromitters had cashed a policy of insurance on the life of the deceased, and who claimed to retain the proceeds by way of lien for payment of premiums advanced by them. *Lanarkshire District Committee* v *Barrett, &c.*, ... 187

See also DILIGENCE.

Jurisdiction—

Actor — Actor-manager — Carrying on Business — Place of business — Sheriff Courts Act, 1907, *sec.* 6 (*b*). — An actor-manager on tour with his company and fulfilling a week's engagement at a theatre, owned, occupied, and licensed by third parties, has not a place of business there so as to give jurisdiction in the sheriffdom in which such theatre is located. *Robb* v *Lely*, ... 81

Interponing authority to decree arbitral—Objections.—In an action to interpone the authority of Court to a decree arbitral and for payment of a sum found due under an arbitration award, the defenders pleaded that the award was *ultra vires* and invalid, and that the arbiter had no power to assess and award damages. *Held* that the Sheriff had no jurisdiction to try the questions raised in the defences (*Forbes* v. *Underwood*, 1886, 13 R. 465, applied). *Waugh* v *Baxter & Sons*, ... 162

Business in Shire—Transfer of business by limited company to director—No notice of transfer made to public or to customers—No change in personnel *of staff—Banking account—Sheriff Courts Act*, 1907 (7 *Edw. VII., cap.* 51), *sec.* 6 (*b*).—By minute dated 8th March, 1921, a limited liability company trading under the name of the principal partner with the addition of the word "Limited," and having their head office in Dumfries, sold their branch business at Ayr as from 1st January, 1921, to the said partner. Thereafter the word "Limited" was removed from the sign-board above the premises at Ayr and deleted from the printed forms used there, but no notification of the change of proprietorship was made to the public by advertisement or to the customers of the

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Jurisdiction—*continued.*

company by circular. The *personnel* of the staff at Ayr remained unaltered. Down to 12th March, 1921, payments of accounts due to the company's branch at Ayr prior to 8th March were paid into the company's banking account at Ayr, and down to 2nd April, 1921, payments of accounts owing by the company's branch at Ayr prior to 8th March were paid by cheques on the said bank signed by the manager at Ayr on behalf of the company and issued from the said premises. The company's bank account at Ayr was closed on 27th August, 1921. *Held* that on 11th March, 1921, the company were still carrying on business, and had a place of business within the jurisdiction of the Sheriff at Ayr in the sense of sec. 6 of sub-sec. (*b*) of the Sheriff Courts Act, 1907. *Mackay* v *Penman, Limited*, ... 189

Landlord and Tenant—

Removing—Summary ejection—Waiver of notice to quit by subsequent acceptance of rent—Increase of Rent, &c. (Restrictions), Act, 1920, *secs.* 5 (1) (*b*) *and* 16 (3)—*Sheriff Courts Act*, 1907, *sec.* 37.—*Held* (1) that, subject to the saving introduced by sec. 16 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a landlord who accepts rent after a notice to quit thereby waives the notice, and is personally barred from founding on it; (2) that the giving of due notice is essential to entitle the owner to apply for a warrant of summary ejection against an occupier who holds *qua* tenant, and that breach of the obligations of the tenancy on the part of the tenant does not obviate the necessity of such notice. *Black* v *M'Allister*, ... 5

Increase of Rent, &c. (Restrictions) Act, 1920, *sec.* 2 (1) (c) *and* (d)—"*not reasonably fit for human habitation, or otherwise not in a reasonable state of repair*"—*Refusal of landlord to make interior decorations—Certificate of sanitary inspector.*—*Held* that the refusal or failure of the landlord of a dwelling-house to replace wall-paper which had been removed or damaged when repairs to plaster were being made was not a defect in respect of which it could be found that the house was not in all respects reasonably fit for human habitation, or otherwise not in a reasonable state of repair, so as to entitle the tenant to an order suspending increase of rent. *Sinclair* v *Macdonald*, ... 43

Summary ejection—Increase of Rent, &c., Act, 1920—*Alternative accommodation—Statutory corporation—Crown prerogative—Crown property—Crown's exemption from public statute.*—Circumstances in which *held* that pursuers were not entitled to plead that they represented the Crown, they being a statutory body having no rights apart from the statute constituting them, and an action of summary ejection at their instance dismissed as irrelevant in respect of pursuers' failure to aver that alternative accommodation available to tenant. *Opinion* that the statute above referred to applied to Crown property held as revenue-producing subjects. *Prison Commissioners for Scotland* v. *Donaldson*, 66

Furnished dwelling-house—Removing—Summary ejection—Notice—Sheriff Courts Acts, 1907 *and* 1913, *sec.* 38, *rules* 113, 115, *forms* J *and* K.—*Held* that written notice in statutory form is an essential preliminary to an action of summary removing and ejectment under sec. 38 against the tenant of a furnished house let for a period of less than a year, and, no valid notice having been given, action *dismissed* (*Campbell's Trustees* v. *O'Neill*, 1911, S.C. 188, applied). *Aitken* v. *Morris*, ... 70

Ejection—Notice of removal—Lease containing obligation to remove without warning—Sheriff Courts Act, 1907, *sec.* 37, *rule* 110.—A lease of a furnished house was contracted for one year from 1st July, 1920, under the declaration that parties might terminate the lease at Whitsunday, 1921, on one month's notice in writing, and containing an obligation by the tenant to flit and remove at the expiry of the lease without warning or other process of removing. The lease was not terminated at Whitsunday, 1921, and at 30th June, 1921, the natural termination of the lease, the tenant declined to remove, contending that he was entitled to forty days' written notice. Action of ejection by the landlords *dismissed* as irrelevant, in respect that notice in terms of above statute not given; such notice to be a writing different from the lease itself. *Observations* as to discrepancy between sec. 37 and rule 110 (*supra*) and method of reconciling them. *Cesari, &c.* v *Anderson*, ... 137

Increase of Rent, &c. (Restrictions) Act, 1920—*Suspension order—House not "reasonably fit for human habitation or not in a reasonable state of repair"—Certificate from sanitary authority—Decorations.*—*Held* (1) that the existence of

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Landlord and Tenant—*continued.*

defects necessary to warrant a suspension order must be proved in the ordinary way. A specification of defects in a certificate from the sanitary authority is neither conclusive as to the facts nor as to the legal effect of the defects stated in it; and (2) that, in the circumstances, the defects stated in the sanitary inspector's certificate and averred by pursuer were not relevant to ground an application for an order suspending increase of rent. *Britton* v *Anderson*, ... 142

Removing—Title to sue—Infeftment.—Held that personal title is sufficient to enable a general disponee to pursue an action of removing, provided that pursuer takes infeftmente before decree is pronounced. *Mitchell* v *Shanks*, ... 155

Landlord and tenant—Hypothec—Sale of property and tenant's business at same time to same purchaser—Half-year's rent unpaid by selling tenant.—Held that purchaser of tenant's stock, who was also the purchaser of the heritable property, was liable in payment of the rent for the half-year preceding the term of entry. *Fitzgerald* v. *Simpson*, ... 160

Boundary fence—Substituted fence erected by tenant for his own purposes—Damage caused by fence blown away by gale.—The tenant of a field, who was a breeder of horses, removed for his own purposes, but with the consent of the landlord, a stob and wire fence which bounded the field from the public road and erected in its place, at his own expense, a close-boarded fence over 6 feet high. Thereafter the field was sold by the landlord and the purchaser granted a new lease to the tenant. Part of the fence having been carried away by a gale of wind was thrown against and damaged neighbouring property. *Held* that the fence was the property of the owner of the field, and that he was liable for the damage. *Boyle* v *Ayr Town Council*, ... 228

Lease—Breach of stipulation—Irritancy.—Under lease between pursuers and defender, the latter undertook to supply pursuers' hydropathic establishment with supplies of fresh milk as required. This stipulation was not among those which were fenced by the irritant clause of the lease. Circumstances in which *held* that pursuers' averments as to defender's breach of this obligation did not entitle them to declarator of irritancy and removing against him. *Observations* as to (1) the distinction between declarator of irritancy legal or conventional, and declarator of forfeiture of possession in respect of breach of a stipulation in a mutual contract of lease; and (2) whether such an obligation in a lease as was here in question entitled the landlords to put an end to the lease or merely claim damages in respect of non-performance of that particular obligation. *Obiter*—"Moreover the principles governing the right to rescind an ordinary contract are, in their application to the relation of landlord and tenant in an agricultural lease, subject to important qualifications; for the incidents of such a contract of lease and the tenant's right of possession thereunder are specifically regulated and protected by law." *Kilmacolm Hydropathic Co., Ltd.* v *Hall*, ... 233

Increase of Rent, &c. (Restrictions) Act, 1920, *sec.* 5 (1)—*Recovery of possession—Servant in whole-time employment.*—Circumstances in which proprietors were entitled to recover possession of dwelling-house for occupation of servant in their whole-time employment. *Falkirk and District United Co-operative Society, Ltd.* v *Potter, Jun.*, ... 276

Lease—Removing—Small dwelling-house—House-Letting and Rating (Scotland) Act, 1911—*Period of tenancy.—Held* that secs. 4 and 12 of the House-Letting and Rating (Scotland) Act, 1911, invalidate a lease of a dwelling-house to which the Act applies for a period beyond the day upon which the next payment of rent falls due, or, if that is not a "lawful date," the "lawful date" next following the said day, and defence that the lease was a yearly one notwithstanding that the rent was paid quarterly repelled. *Falkirk and District United Co-operative Society, Ltd.* v *Potter, Jun.*, ... 276

Increase of Rent, &c. (Restrictions) Act, 1920, *sec.* 5 (1) (*d*) *and* (*ii.*)—*House required for the occupation of a person necessary for the proper working of a farm—Finality of certificate by Agricultural Committee—Alternative accommodation.—Held* that a certificate granted by a County Agricultural Committee in terms of sec. 5, *supra*, was conclusive evidence that a dwelling-house was required by a landlord for the occupation of a person engaged on work necessary for the proper working of an agricultural holding. *Macpherson* v *Simpson*, ... 281

See also PROCESS, STATUTE.

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Lease. *See* LANDLORD AND TENANT.

Legacy Duty. *See* SUCCESSION.

Local Government—

Neglect of statutory duty—Defective street lighting—Glasgow Police Act, 1886, *secs.* 149 (5) *and* 357.—Municipal corporation *held* liable for damage to a vehicle colliding with an erection in a street, which was not sufficiently lighted so as to be reasonably visible to the driver of the vehicle. *Hutchison* v *Glasgow Corporation*, ... 101

Excise penalty—Roads Act, 1920, *sec.* 1 (2) *and sec.* 8 (3)—*Finance Act*, 1920, *Schedule II., Articles* 3 *and* 6—*Title to prosecute.—Held* that a county council has no title to prosecute in its own name for excise penalties under the Roads Act, 1920. *Lanarkshire County Council* v. *Baxter*, ... 157

Housing of working classes—Housing, Town Planning, &c. (Scotland) Act, 1919 (9 *and* 10 *Geo. V., cap.* 60), *sec.* 25—*Repair of houses not reasonably fit for human habitation—Cot houses on farm—Owner—Dry closets and wash-houses.*—By sub-sec. (1) of sec. 25 of the Housing, Town Planning, &c. (Scotland) Act, 1919, it is enacted that if the owner of any house suitable for occupation by persons of the working classes fails to keep such house in all respects reasonably fit for human habitation, the local authority may serve a notice on such owner requiring him within a reasonable time to execute such work as may be necessary to make the house in all respects reasonably fit for human habitation. By sub-sec. (3) it is provided that in the section the word "owner" shall have the same meaning as in the Public Health (Scotland) Act, 1897. *Held* (1) that cot houses on a farm fell under the section; (2) that the owner of the farm was the owner of the cot houses within the meaning of the section; and (3) that dry closets and wash-houses, although separated from the houses were necessary pertinents of the houses, and must be kept in similar condition. *Remarks* as to the appropriate form of the notice to be served by the local authority. *M'Mikin's Curator* v *Local Authority of Carrick District of County of Ayr*, ... 194

See also DEPOSIT.

Lost Property—

Ownership—Articles left in taxi-cab—Competing claims of driver and the cab owners.—Held that an employee of cab proprietors was not entitled to possession of property left in a cab, which property he was by the rules of his employment bound to hand over to his employers; and that the claim of his employers to possession of it was preferable. *Corporation of Glasgow* v *Northcote, &c.*, ... 76

Master and Servant—

Harbouring by employer of servant in breach of his contract of service—Knowledge of desertion—Dismissal and subsequent re-engagement.—A farmer who had engaged a deserting servant, dismissed him on being informed that he was under contract elsewhere, but subsequently re-engaged the same servant and continued to employ him after intimation that he was still under contract to his first employer. Action for knowingly harbouring a deserting servant *held* relevant (*Rose Street Foundry Company* v *Lewis & Sons*, 1917, S.C. 341, applied), and, after proof, reparation awarded. *Muir* v *Alexander*, 63

Workmen's compensation—Accident—"Arising out of"—Window cleaner found injured on premises—No direct evidence—Death of Workman.—A window cleaner engaged in cleaning the windows of business premises was found lying in a dazed and injured condition on the basement floor below an open trap door in the floor above, and died soon thereafter without regaining consciousness. No direct testimony as to the cause of these fatal injuries was available, but it was *held* after proof of the facts and circumstances that they were caused by accident arising out of and in course of the workman's employment, and compensation was awarded to his representatives. *Virtue, &c.* v *Skinner*, ... 89

Workmen's compensation—Domestic employment—Medical services claimed to be a "benefit."—A woman employed as an ordinary domestic help having met with an

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Master and Servant—*continued.*

accident in the course of her duties, causing a fracture of her thigh bone, sued for compensation, and her employer (a doctor) claimed that his account for professional attendance was a "benefit" to be taken into account in fixing weekly payment. *Held* this account not a "benefit" in the sense of the statute. *Johnston* v *Homer*, ... 140

Workmen's compensation—Notice of accident—Prejudice—Mistake or other reasonable cause.—A workman met with an accident by being struck on the left side of the abdomen on 22nd December, 1920, and worked on till the 31st December, when the pit closed for the New Year holidays. While working during said period, he suffered pain, and was aware of a swelling in his side. On or about 3rd January, 1921, he took to his bed, and notice was given on his behalf on 11th January. *Held* that notice was not given as soon as practicable after the happening of the accident, that the employers were prejudiced in their defence by want of said notice, and that want of notice was not due to mistake or other reasonable cause, and compensation refused. *Livingstone* v *Summerlee Iron Co., Ltd.*, ... 146

Workmen's compensation—Medical reference—Examination—Workman's refusal to submit for examination.—A minute under Schedule I., sec. 15, of the Workmen's Compensation Act, 1906, was lodged with the sheriff-clerk at Airdrie, who referred the matter to one of the medical referees appointed by the Secretary of State. The workman, on receipt of the notice from the sheriff-clerk, wrote to his mandatory, who signed the minute of reference, stating that he would not consent to any medical referee in his case, and, on receipt of the intimation from the medical referee requesting him to attend for examination, forwarded it to said mandatory, stating that he "refused to do any such thing," and did not attend for examination. In an application, following said minute of reference, for an award of compensation, *held* that, until such examination had taken place, the workman's right to compensation and to take or prosecute any proceeding under the said Act, including the present proceedings, fell to be suspended. *Devlin* v. *Bargeddie Coal Co., Ltd.*, ... 178

Workmen's compensation — Workman under majority — Partial incapacity — First Schedule, secs. 3 *and* 16. — A workman was injured by accident arising out of and in the course of his employment in 1915, when under twenty-one years of age. In an application in 1922 for review under sec. 16 of the First Schedule of the Act of 1906 it was admitted that the workman was still partially incapacitated, and it was proved that the difference between the average weekly wage he would probably have been earning at the date of review if he had remained uninjured and the average weekly wage he was actually then earning was more than £1. *Held* that as this difference represented the loss in wage-earning capacity sustained by him by reason of the accident the workman was entitled to an award of compensation at the minimum rate of £1 a week. *Observations* on the assessment of compensation under sec. 16 and sec. 3 of the Schedule respectively. *Douglas* v *Dixon, Limited*, ... 222

Multiplepoinding. *See* PROCESS.

Negligence—

Negligence—Property—Deposit of rubbish in adjoining field.—A railway company whose servants deposited miscellaneous rubbish in a field without the permission of the proprietor or tenant thereof *held* liable for the loss of a cow belonging to a shepherd in the employment of the tenant, which while grazing in the field ate some rags with paint on them which she found among the rubbish, and in consequence died of lead poisoning. *Elliott* v *North British Railway Co.*, 17

Negligence—Collision—Main road and side road traffic—Counter claim—Credibility of witnesses.—Pursuers sued defender for loss and damage sustained by them arising out of a collision between their respective motor cars, which occurred at the intersection of a main road (on which pursuers' car was being driven) and a side road (on which defender's car was being driven), and averring negligence on defender's part. Defender counter claimed, averring negligence on pursuers' part. *Held* pursuers solely at fault, and defender entitled to damages as counter claimed. *M'Rae & Haldane* v *Lindsay*, ... 55

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Negligence—*continued.*

Contributory negligence—Proximate cause—Leaving horse unattended—Leaving motor car in unauthorised place.—The pursuer left his motor car standing unattended on a piece of ground adjoining a railway station, notwithstanding that the railway company had issued a prohibition against leaving motors there. The defender, a cab proprietor, having business at the same station, left his horse and carriage unattended near pursuer's car. The horse was startled, and in running away damaged pursuer's car, which damage the latter sought to recover from defender. *Held*, in the circumstances, that though defender was negligent, the contributory negligence of the pursuer prevented him recovering. *Barty* v *Harper & Sons*, 1921, 2 S.L.T. 277, referred to. *Observations* of Lord Chancellor in *s.s.* "*Volute*," 15th December, 1921, as to contributory negligence, applied. *Allen* v *Henderson*, ... 131

Negligence—Roadway—Invitation—Concealed danger.—Circumstances in which held that a tenant farmer who had contracted with a thrashing mill owner to do some thrashing at his farm was not entitled to recover from the latter the damage done by the mill engine to a weighbridge at the farm, which weighbridge was flush with the level of the roadway, and was indistinguishable from the rest of the roadway, and regarding which no notice had been given to the defenders' engine-driver, so that he might be on the lookout to avoid it while driving along the roadway. *Malcolm* v *Trotter & Sons*, ... 259

Ship breaking loose from moorings—Responsibility of harbour authority—Sunken wreck in harbour.—Circumstances in which *held* that Harbour Commissioners were not liable for damage done to a boat which had been berthed in their harbour and which during a storm had broken from her moorings and been driven on to sunken and partially submerged wreck in the harbour. The master of the boat having selected the berth and the adjacent wreck being then visible he took the risk of possible damage from such wreck in the event of his boat breaking adrift. *Crockett* v *Stornoway Pier and Harbour Commission*, ... 269

Road collision—Main road and side road traffic.—Circumstances in which the Court found that the owner of a motor car which was being driven on a main road was not liable for damage caused to a cyclist emerging from a side road and colliding with his car. *Observations* as to respective obligations of main road and side road traffic. *Gordon v Henderson*, ... 293

See also PROPERTY.

Payment—

Evidence—Clean receipt—Error.—In this action which was for payment of balance of a mercantile account, the defender produced and founded on a full and unqualified receipt by pursuers and pleaded payment. The pursuers were allowed a proof *prout de jure* as to the circumstances in which the receipt was granted, as a result of which it was *held* that the receipt had been fraudulently procured, and that pursuers were entitled to decree for the balance sued for. *Scottish Motor Traction Co., Ltd.* v *Hughes*, ... 218

Penalty. *See* CONTRACT, LOCAL AUTHORITY, PROCESS.

Poor—Agents for—

Appointment of agents for the poor—Objections—Law Agents Act, 1873, *sec.* 13—*Sheriff Courts Acts*, 1907-1913; *rules* 159 *and* 160. *Stirlingshire Law Agents* v *Frew*, ... 289

Process—

Expenses—Fees to counsel—Circumstances in which fees allowed to counsel for the pursuer, though defenders were not represented by counsel. *Elliott* v *North British Railway Co.*, ... 18

Reponing—Sheriff Courts Act, 1907, *rule* 31.—*Held* that the £2 consigned with reponing note is payable to pursuer even although the reponing note had been lodged under a mistake as to the position of the process. *Hart* v *Barras*, ... 27

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Process—*continued.*

Multiplepoinding—Subject in medio *a sealed envelope deposited in a bank by a person now deceased—Claims by deceased's trustees and by the person to whom envelope addressed—Double distress—Competency.*—William Reid during his life deposited with his bankers a sealed envelope bearing this holograph endorsement—"This letter to be handed to Mr. William Reid, jr., 178 Campbell Avenue, Langside, after my death, if not claimed by me before that." This letter remained with the bank till Mr. Reid died, thereafter it was claimed by Mr. Reid's testamentary trustees and by Mr. Wm. Reid, jun. *Held* in an action of multiplepoinding at the instance of the bank, that the claim of William Reid, jun., should be preferred, and delivery to him of the envelope ordered; *observations* as to competency of action of multiplepoinding in above circumstances. *Clydesdale Bank, Ltd.* v *Reid's Trustees, &c.*, ... 48

Multiplepoinding—Competency—Double distress—Price in auctioneers' hands—Claims by buyer and seller.—A dispute arose between the buyer and seller of a horse sold at an auction mart as to whether the horse was conform to warranty. The auctioneers had at the sale received the price from the buyer and had retained it. They afterwards sold the horse "for whom it might concern." The buyer claimed repayment of the price, while the seller called upon the auctioneers to hand over the price to him. In an action of multiplepoinding brought by the seller as real raiser, *held* that there was no double distress, and the action dismissed; *opinion* that the true position was that the auctioneers were bound to account to the seller only, but the only claim the buyer had against them was through the seller. *Foster* v *Brown*, ... 50

Motion that common law claim of damages for personal injury proceed under Workmen's Compensation Act—When competent—Appeal against interlocutor granting such motion—Sheriff Courts Act, 1907, *sec.* 27.—*Held* (1) that an ordinary action for damages for personal injuries not maintainable at common law could be allowed to proceed as a claim under the Workmen's Compensation Act, 1906, when motion to that effect made after decree of absolvitor had been granted, but before Auditor's report on defenders' account of expenses approved of and extract issued; (2) that an interlocutor allowing such ordinary action to proceed as a claim under the Workmen's Compensation Act could not be appealed to the Sheriff without leave. *Stewart* v *Perth General Station Committee*, ... 53

Title to sue—Unregistered proprietor of a patent—Amendment of instance—Patents and Designs Act, 1919, *sec.* 16 (4).—*Held* (1) that an assignee of a patent who had not entered his name as proprietor on the Register of Patents could not maintain an action for infringement, but (2) that amendment of the instance by conjoining as a pursuer the person originally registered, and adding an averment that the assignee's title had now been registered, was competent, and action allowed to proceed. *Handy Washer Syndicate, Ltd.* v *Vanderaa*, ... 95

Expenses—Removing—Rent £30—*Scale—Rent Restriction Act.*—In ordinary removings the scale of taxation of expenses is determined by the amount of the rent and the restrictions which are placed by the Increase of Rent, &c. (Restrictions) Act on a landlord recovering possession at the termination of a let do not, *quoad* expenses, make an action of removing then instituted an extraordinary removing. *Tod & Sons, Ltd.* v *Sinclair*, ... 114

Remit—Procedure.—*Circumstances* in which objections to the report of a chartered accountant, to whom remit had been made of consent of parties, *repelled*. *Observations* with regard to reporter's duty. *Lyle & Wallace* v. *M'Kechnie*, ... 167

Different Sheriffs-Substitute in same sheriffdom—Uniformity of practice.—In this case the same question of law which was decided in *Lord Advocate* v. *Baker*, 1921, 37 Sh.Ct.Rep. 177, arose, but the case came before a different Sheriff-Substitute who, being satisfied that the only question was the same question of law which had already been answered, declined to consider it of new, and repeated the same finding in law as had been pronounced by his colleague. *Lord Advocate* v *Barlow*, ... 182

Appeal—Competency—Repair of houses suitable for occupation by working classes—Housing, Town Planning, &c., (Scotland) Act, 1919 (9 *and* 10 *Geo. V., cap.* 60), *sec.* 25 (1).—In terms of sec. 25, sub-sec. (1) of the Housing, Town Planning, &c. (Scotland) Act, 1919, notices were served by a local authority on the owner

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Process—*continued.*

of a farm to execute certain work alleged to be necessary to make the cot houses on the farm in all respects reasonably fit for human habitation. The owner raised an action in the Sheriff Court to have these notices recalled. After proof, the Sheriff-Substitute pronounced an interlocutor refusing to recall the notices. The owner having appealed to the Sheriff *held* that the appeal was incompetent. *Remarks* as to the appropriate form of appeal. *M'Mikin's Curator* v *Local Authority of Carrick District of County of Ayr*, ... 194

Proof—Additional evidence.—Application (made after Sheriff-Substitute had given judgment) to be allowed to lead further evidence alleged to have been omitted owing to neglect of agent to call certain witnesses, *refused*. *Barnes* v *Hannay, &c.*, ... 202

Expenses—Minor pursuer—Father consenting as curator.—A father who gives his consent to an action at the instance of his minor child merely to make it competent and who neither promotes the action nor interferes with its conduct is not liable in expenses to the successful defender. *Gordon v Henderson*, ... 293

Proof—Lost document—Proving of the tenor—competency.—In defence to an action for payment, the defender averred that the debt had been paid by cheque which he had handed to pursuer, and which had been duly cashed, but that the cashed cheque, after coming back from the bank to defender, had been mislaid by him, and he offered to prove the tenor of this missing cheque.—*Held* that it was incompetent to prove the tenor in the Sheriff Court, even as an incident in the main proof, and defender being unable to prove payment by writ or oath, decree was granted for the sum sued for. *Lawson v Stewart*, ... 299

See also Affiliation and Aliment, Evidence, Jurisdiction.

Proof. *See* Process.

Property—

Private avenue — Accessible for business purposes — Horse yoked to lorry delivering goods eating leaves of yew tree and being poisoned — Implied invitation —Duty to fence.—Held that the proprietor of the *solum* of a private avenue, which was the sole access to certain dwelling-houses built on feus given off by said proprietor, was liable for damages in respect of the death of a horse which was poisoned by eating the leaves of a yew tree planted in the avenue, for the reason that there had been neglect of the duty to fence a dangerous thing situated in a place to which persons having business with the occupants of said dwelling-houses were impliedly invited. *Millar* v *Bonar*, ... 8

Telephone pole—Dispute or difference as to its removal—Contract—Proximity to dwelling house—Nuisance—Public interest—Implied consent—Telegraph Act, 1863, *secs.* 22, 30, *and* 34; *Telegraph Act*, 1878, *secs.* 2, 3, 4, and 5; *Telegraph Act*, 1892, *secs.* 4 *and* 9; *Telegraph (Arbitration) Act*, 1909, *sec.* 1; *Telegraph Act*, 1916, *secs.* 1, *and* 2,—When a landowner consents to the erection of a telegraph or telephone pole on his property, and subsequently requests its removal, the special tribunal set up under the above statutes (in Scotland the Sheriff as arbitrator) may consent, so as to bind the landowner, that the pole remains. *Circumstances* in which such substituted consent refused. *Postmaster-General* v *Grimmond*, ... 204

See also Landlord and Tenant, Negligence.

Public Health. *See* Local Government.

Public Policy. *See* Contract.

Railway. *See* Carriage, Negligence.

Registration of Business Names Act—

Action for repayment of contract price—Personal bar—Relief—Distinction between enforcing and rescinding a contract.—Held that the power of the Sheriff to grant relief from disability under sec. 8 of the Registration of Business Names Act, 1916, is limited to actions for enforcing contracts, and that in the present case, as the claim involved rescission of the contract, relief could only be granted by the Court of Session, and action sisted to permit of application for such relief being made. *Clydesdale Motor Transport Co.* v *M'Cosh & Devine*, ... 109

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Remit. *See* PROCESS.

Removing. *See* LANDLORD AND TENANT.

Rent Restriction Acts. *See* LANDLORD AND TENANT.

Restraint of Trade. *See* CONTRACT.

Roads—Roads Act. *See* LOCAL GOVERNMENT, NEGLIGENCE.

Sale—

Offer and acceptance—Alternative offer—Order—Consensus in idem.—An offer to sell goods at a certain price *ex* factory, or at a certain higher price delivered, is an alternative offer, either alternative of which may be accepted; but it is not an order which must be certain and not alternative. Circumstances in which *held* that a concluded agreement of sale had not been made. *Craig & Co., Ltd.* v *Willox, Ltd.*, ... 28

Horse—Warranty—Rejection.—A horse was sold on three days' trial under warranty that it was "fit for all farm work, free from vice, and pass all road traffic." *Held* that, as the horse refused to pass under railway bridges when drawing a coal cart and attempted to bolt when passed by a motor car and also bolted a short distance along the road towards some young horses, it was disconform to warranty. *Macpherson* v. *Stewart*, ... 175

Cow in Calf—Warranty—Representations by seller.—Circumstances in which it was *held* that in the sale of a cow no warranty was given that she was in calf. *Low* v *Horne*, ... 284

Sale of goods—Minor—Necessaries.—Circumstances in which *held* that the purchase of a bicycle by a minor without the consent of his curator was reducible by way of exception, and without proof of lesion, a bicycle not being a necessary for the minor. *Brown* v *Anderson, &c.*, ... 278

Scrip. *See* NEGLIGENCE.

Sequestration. *See* BANKRUPTCY.

Statute—

The Crown—Roy n'est lie per ascum statute si il ne soit expressement nosme—*Increase of Rent, &c.* (*Restrictions*) *Act*, 1920.—*Held* that this statute does not apply to the Crown. *Lord Advocate* v *Baker*, 1921, 37 Sh.Ct.Rep. 177, *approved*. *Lord Advocate* v *Barlow*, ... 182

Succession—

Trust—Payment of debts—Liferent to truster's widow—Deathbed and funeral expenses of widow.—Held that the deathbed and funeral expenses of a testator's widow, the liferentrix of his estate, were a proper charge on his estate, the widow having died in indigent circumstances, and having no separate estate of her own. *Wardhaugh, &c.* v *Baldie*, ... 39

Will—Direction on cover of sealed envelope.—Held (1) that a sealed envelope, with an endorsement directing that after the writer's death it be handed to a certain person, was not a testamentary writing by the inscriber of the endorsement, but formed a piece of property of which the person named was entitled to get delivery; (2) that in an action of multiplepoinding brought to determine the question of delivery, averments based on assumptions as to the contents of the sealed envelope were irrelevant. *Clydesdale Bank, Ltd.* v *Reid's Trustees, &c.*, 48

Legacy duty—Court of Session decree proceeding on agreed settlement—Share of executry estate.—Held that owing to the terms of settlement of an action raised by legatees against an executor for payment of their shares in succession, the executor was barred from subsequently recovering from such legatees legacy duty paid by him on their shares. *Johnston* v *Johnston*, ... 291

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Title to Sue. *See* PROCESS.

Vitious Intromission—

Goods held on hire agreement—Auctioneer selling on instructions of possessor and ostensible owner—Liability to true owner—Carrier—Removal contractor.—Circumstances in which *held* (1) that an auctioneer was liable to the owners for the value of goods sold by him, which were on hire, and which he had sold on the instructions of the party possessing under the hire agreement; but (2) that the removal contractor who had conveyed the goods to the auctioneer's rooms was not liable. *Furniture Supply Co., &c.* v *Clark, &c.*, ... 99

Warranty. *See* SALE.

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